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IN THE

Supreme Court of the United States.

October Term, 1900.

W. P. H. McFADDEN et al., Plaintiffs in Error,

vs.

JOHN R. BLOCKER et al., Defendants; EVANS-SNIDER-BUEL CO., Interpleader, Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

H. M. POLLARD,
Counsel for Defendant in Error.

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STATEMENT.

In June, 1896, plaintiffs in error brought an attachment suit against defendants Blocker et al., in the United States Court for the Northern District of the Indian Territory, and levied upon some 7,000 head of cattle. Immediately thereafter defendant in error interpleaded in the case giving bond, and took possession and disposed of the cattle. Afterward and on January 29, 1897, a judgment was rendered by default against the defendants Blocker et al., for the amount claimed.

After the rendition of said judgment, and on, to wit: the 3d day of February, 1897, the Congress of the United States enacted and the President approved the following Act:

> "Be It Enacted, etc., that section 4742 of Mansfield's Digest of the laws of Arkansas heretofore put in force in the Indian Territory is hereby amended by adding to said section the following:
>
> "Provided, that if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated.

The suit was based on a judgment against the defendants Blocker et al., which had been obtained in the District Court of Texas, more than nine years theretofore. The interplea of the plaintiff in error was as follows:

> "Comes now Evans-Snider-Buel Co., a corporation, organized under the laws of the State of Illinois, and represents that it is the owner and entitled to the possession of the following described cattle now in pastures near Summit, Indian Territory: 6775 head of cattle, of which 5140 are three and four year old steers and 1635 are cows. Said cattle are branded, as follows:
>
> (Describing brands.)
>
> "That said property has been levied on as the property of J. R. Blocker by virtue of an attachment issued in this case, dated June 17, 1896, wherein Wm. Fadden & Son are plaintiffs and James W. Taylor et al., are defendants, which cause is now pending in said court."

Said interplea was duly verified. There was an answer filed to said interplea which was in substance a general denial.

At the trial of the case made by the interplea the interpleader introduced four mortgages which are not necessary to set out here, because there is no controversy whatever concerning the same. Said mortgages were executed by defendant Blocker to the interpleader, several months before the bringing of the attachment therein, and covered the identical cattle attached. Said mortgages were executed in the State of Texas, of which state said Blocker was a citizen and resident, and were duly recorded in the county of which Blocker was a resident in said State of Texas, and were also immediately recorded in the judicial district in which the property was situated in the Indian Territory at the time the mortgage was executed; that at the time of the execution of the mortgage the cattle were in the Indian Territory, and that all the above-mentioned records of said mortgages had been made some months prior to the commencement of this attachment suit.

Interpleader also introduced the notes executed by said Blocker to it, evidencing the debt secured by said mortgages, which notes aggregated $132,000.00.

Interpleader further offered in evidence the writ of attachment above referred to and the return thereof. It was then stipulated by the parties, plaintiff and interpleader, that the property levied on is the same as that described in the mortgages introduced in evidence.

It was also agreed between the plaintiffs and interpleader that the plaintiffs had actual notice of the mortgages at the time the levy was made, and that they

had actual notice of the existence of the mortgages introduced in evidence, and which were recorded in the Northern District of the Indian Territory at the time of the levy of the writ of attachment, and that the mortgages were examined by counsel for plaintiffs in the attachment suit and that the description of the property was taken from the record thereof, before the attachment was issued.

Whereupon the interpleader proved by Amos T. Atwater, that he was secretary of the interpleader and its managing officer at the National Stock Yards, Illinois, that interpleader advanced $132,000 to said Blocker, which advance was evidenced by the notes put in evidence which were secured by said mortgages, which notes plaintiff then admitted evidenced the indebtedness of Blocker to interpleader which said mortgages were executed to secure.

Interpleader further proved by said Atwater that the very money which it advanced to said Blocker, and which was secured by said mortgages, was used by Blocker in the purchase of the cattle attached;

That said interpleader advanced all the money that went into the purchase of said cattle, and that defendant Blocker did not advance one dollar of it;

That at the time the attachment was levied in this case the whole of the interpleader's debt was unpaid and aggregated $132,000, and that the cattle attached were supposed to be worth about that sum, but when they were sold on the market they only yielded $100,000.

Interpleader proved by defendant John R. Blocker that he was the Blocker who executed the mortgages and notes read in evidence; that said mortgages were executed at San Antonio, Texas, and that he, Blocker,

was a citizen and resident of the State of Texas at the time of the execution of said mortgages and still is such, and that said cattle were in the Indian Territory at the time the mortgages were executed and in the Northern District and that they were the same cattle that were seized by the marshal in said attachment proceeding;

That the mortgages covered all the cattle he had in the Indian Territory, and that they were all attached, and that he did not put one dollar of his own money into the purchase of said cattle. Whereupon the interpleader rested.

Plaintiffs put in evidence the record of the judgment in the attachment suit which showed that the action was based on a judgment against said defendants Blocker et al. rendered in 1887. Plaintiff also put in the record sustaining the attachment of the same. Whereupon the court at the request of the interpleader, instructed the jury that they must return a verdict in favor of the interpleader, which was accordingly done. Whereupon, the following stipulation was made:

> "It is agreed by the attorneys for the intervener in open court that in case the judgment in this court shall be in favor of the interpleaders and against the plaintiffs, that if the court of appeals for the Indian Territory shall reverse said judgment that it may at the same time render judgment in favor of the plaintiffs for the amount of plaintiff's demands as shown by the judgment in this case, and for costs. This agreement is made with the understanding that it shall not operate to the prejudice of the interpleader in case it should desire to appeal from that judgment."

It was also agreed by counsel for plaintiffs that interpleader should not be prejudiced in its rights to appeal to any court that should have jurisdiction of such appeal.

There was a judgment for interpleader.

The plaintiffs filed their motion for a new trial, wherein they alleged as reasons therefor,

First. That the court erred in directing a verdict in favor of the interpleader.

Second: That the verdict of the jury is contrary to law.

Third. That the court erred in overruling the objections to the introduction of the mortgages and the statements of the witness Atwater that the money loaned and secured by the mortgages was the purchase money of the cattle levied on.

Which motion was overruled; whereupon the plaintiffs appealed to the United States Court of Appeals for the Indian Territory, in which court the judgment of the trial court was reversed, and in accordance with the stipulation above mentioned, judgment was rendered in favor of the plaintiffs and against the interpleader.

Interpleader then brought the case to the United States Circuit Court of Appeals for the Eighth Circuit, which latter court reversed the judgment of the U. S. Court of Appeals for the Indian Territory and affirmed the judgment of the trial court; from which judgment of the U. S. Circuit Court of Appeals plaintiffs in error bring the case here.

POINTS AND AUTHORITIES.

I.

Where a mortgage is executed by a citizen of one State covering property located in another State and there is no provision for recording such mortgage in the latter State, the rights of third persons either creditors or purchasers attacking such mortgage, must be determined by the common law, if that system is in force in the State where the property is situated.

Under the registry law contained in Mansfield's Digest, in force in the Indian Territory, when the mortgages in controversy herein were given and plaintiffs levied their attachment, there was no provision for recording a chattel mortgage given by a non-resident of the Indian Territory, and as the common law was in force in Arkansas, and likewise in the Indian Territory, the rights of the attaching creditors herein must be determined by the rules of the common law.

Under the common law, the mortgages in question were valid between the parties thereto without delivery of possession to the mortgagee as they were made in good faith to secure the money advanced to purchase the mortgaged property, and they are superior to a subsequent attachment of the same property by a creditor of the mortgagor with actual notice thereof.

Thompson Lumber Co. v. Watson, 49 Ark. 83.
Twynes Case, Smith's Leading Cases;
Stone v. Grubham, 2 Bulstrode;
Edwards v. Harben, 2 Term Rep. 587;
Kadogan v. Kennett, Cow. Rep. 432;
Kidd v. Rawlingson, 2 Bos. & Pul. 59;

Hamilton v. Russell, I Cranch 310;
U. S. v. Hooe, 3 Cranch, 89;
Hempstead v. Johnson, 18 Ark. 134;
Applethwaite v. Harrell & Co., 49 Ark. 281;
Bank of Black Rock v. Decker, 44 S. W. 220;
Sutherland on Stat. Con. secs. 138, 153, 287;
Ghio v. Byrne, 59 Ark. 292;
Cobbey on Chat. Mort. sec. 51;
Main v. Alexander, 9 Ark. 112;
Smith v. Moore, 11 N. H. 63;
Montgomery v. Wright, 8 Mich. 143;
Endlich on Interpretation of Stats. sec. 397;
Ferguson v. Edrington, 49 Ark. 241;
Union Nat. Bank v. Oium, 54 N. W. 1034;
Moore v. City, 42 Ark. 66;
Burton v. Sitlington, 128 Mo. 164.

II.

If the Recording Acts of Arkansas do not apply to non-resident chattel mortgagors they are in conflict with Sec. 2, Art. IV of the United States Constitution.

Cummings v. Missouri, 4 Wall. 321;
Ward v. Maryland, 12 Wall. 430;
Slaughter House Cases, 16 Wall. 119;
Corfield v. Coryell, 4 Wash, C. C. 471;
Crandall v. State, 10 Conn. 339;
Cooley on Con. Lim, 397;
Story on Constitution, sec. 1806;
Farmers' L. & T. Co. v. Chicago, etc., 27 Fed. Rep. 46;
Roby v Smith, 30 N. E. 1093;
Richie v People, 154 Ill. 98;
Third Nat. Bank v. Devine, 34 L. R. A. 446;
Holden v. Hardy, 169 U. S. 366;
Munn v. Illinois, 94 U. S. 145.

III.

The Act of Congress of February 3rd, 1897, is not in derogation of the fifth amendment of the constitution and is retroactive and it made interpleader's mortgages just as effective as if that Act had been in force at the time of their execution.

Watson v. Mercer, 8 Pet. 88;
Satterlee v. Matthewson, 2 Pet. 380;
Steampship Co. v. Goliff, 2 Wall. 450;
Cooley on Con. Lim. 464;
Drake on Attachment, sec. 228;
Johnson v. Richardson, 44 Ark. 365;
Hannah v. Felt, 15 Iowa, 143;
Story on Constitution, sec. 1957;
3 Parsons on Contracts, 552;
Green v. Abram, 43 Ark. 420;
Reid v. Hark, 45 Ark. 41;
Newton v. Tebbets, 7 Ark. 150;
Cupp v. Welsh, 50 Ark. 294;
Sidway v. Lawson, 58 Ark. 117;
Sannoner v. Jacobson, 47 Ark. 40;
Shinn on Attachments, secs. 440, 429;
Huiscamp v. Moline & Co., 121 U. S. 971;
Atkins v. Swope, 36 Ark. 537;
Tenant v. Walker, 58 Ark. 255;
And the authorities cited by the U. S. Cir. Ct. of Appeals in the opinion rendered by it herein.

ARGUMENT.

I.

On December 6, 1837, the Legislature of Arkansas enacted a law which is substantially the statute of Eliz. Ch. 5, which is found in Mansfield's Digest, sections 3374, 3375, which provide that every conveyance or assignment of any estate in goods and chattels made with intent to hinder, delay or defraud creditors shall be void, but no such conveyance shall be deemed void in favor of an innocent subsequent purchaser if the deed or conveyance shall have been recorded, or the purchaser have actual notice thereof.

On December 9, 1837, the legislature adopted the common law. Mansfield's Digest, chapter 20, section 566. On February 20, 1838 the legislature passed the law requiring mortgages to be recorded. Mansfield's Digest, 4742, 4743, which sections are in the identical words of the act as originally passed.

These statutes were all passed during the same session. Did the recording statute, passed February 20, repeal sections 3374, 3375, and did it abrogate the law of mortgages at common law, and the law of actual notice, which was the best notice up to February 20, 1838.

We admit that the law of actual notice was repealed as to resident mortgagors, for whom another notice was provided and required by the statute, but our contention is that it was not repealed as to non-resident mortgagors; but that the statute of frauds which makes actual notice as good as record notice controls in such cases. Sutherland on Statutory Construction, sec. 333, says:

"It is presumed that the legislature is acquainted with the law; that it has a knowledge of the state of it upon the subjects upon which it legislates; that it is informed of previous legislation."

In Section 440, he says:

"Such statutes as take away a common law right, remove or add to common law disabilities or provide for proceedings unknown or contrary to that law are construed strictly. The courts can not properly give force to them beyond what is expressed by their words or is necessarily implied from what is expressed. Statutes are not to be construed as taking away a common law right unless the intention is manifest."

Under this rule of interpretation let us see what is expressed and what necessarily implied in sections 4742, 4743. It is expressly provided that chattel mortgages shall be recorded in the county in which the mortgagor resides, which mortgage shall be a lien from the time it is filed for record and not before, which filing shall be notice to all persons of the existence of such mortgage. It is expressed that only resident mortgagors can record; that there can be no lien without record, and that record shall be notice to all persons; and as sometimes construed by the Arkansas Supreme Court, it is the only notice that will avail; that actual notice is insufficient.

Blocker, when he gave the mortgages to interpleader, was a resident of Texas, and for that reason the mortgages could not be recorded in the Indian Territory, nor could said mortgages be a lien under the statute, because it expressly says, such mortgage shall be a lien from the time the same is filed in the court where the mortgagor resides, *and not before*. Nor under said statute could interpleader give record notice of its claims.

Interpleader could do nothing under the statute to protect his claim against Blocker's creditors, and as non-resident mortgagors are not named and as nothing is directed to be done with mortgages made by non-resident mortgagors, and the statute puts compliance out of the power of interpleader, by no rule of construction can the statute be held to determine the rights of interpleader.

The law does not require impossibilities. It must be reasonable. It requires obedience of those who can obey. Our contention is that the statute has no application to mortgages given by non-resident mortgagors, otherwise the statute should read as follows: Chattel mortgages must be recorded in the county of the residence of the mortgagor, and they shall be liens from the time of filing for record and not before, and such record shall be the only notice of the existence of said mortgages, and the provisions of this statute shall equally apply to mortgages by resident and non-resident mortgagors. How would the courts construe such a law? Would not any intelligent court hold the law valid as to resident mortgagors and invalid as to non-resident mortgagors?

What was the intention of the legislature? Evidently to require mortgages to be recorded. But if that was the object it could not have been the intention that mortgages given by non-residents should be recorded or there would have been a provision, as in the case in most states, and in Arkansas and the Indian Territory, now, requiring such mortgages to be recorded in the county where the mortgaged property was situated. But as there is nothing expressed in the statute about non-resident mortgagors and as it, by its terms necessarily excludes them from its provisions, the reasonable inference, as well as the construction under the rule

given by Sutherland, is that it was not intended to affect in any way mortgages given by them, but to abrogate the common law only as to resident mortgagors, and only to the extent expressed. If the object of the statute was to give notice by record, and record was the best and only notice allowed, why did not the legislature provide for record where property was located in case of mortgages by non-residents? Why say that notice of mortgages by residents must be by record, but as to non-residents it must be by mortgagee taking possession. Is there any reason for such a distinction? No. Nor has the statute made any such. It has no application to mortgages by non-residents.

On the non-applicability of the statute, we refer to Maxwell vs. Collins, 8 Ind. 38, cited in Suth. Stat. Con., section 429. In this case the statute provided that no person shall be sued before a justice of the peace except in the township where he, the defendant, resides. The court held that it did not apply to non-resident defendants. See also Wheeler vs. McCormick, 8 Blatchford, 267. The case of Atkins vs. Borstler, 46 Mich. 552, 9 N. W. Rep. 850, was a decision by the Supreme Court of Michigan on a statute which required all transitory actions to be brought in the county where one of the parties resided at the time of the commencement of the suit. The court held that it did not apply to non-residents, and in passing upon the contention of defendant that as neither party resided in Kent county he could not be sued there, said, if the statute in question could have any such effect according to its ordinary meaning we are compelled to choose between holding it to that extent *void*, or construing it according to what no doubt was its real intent, as not applicable here.

The same may properly be said about the Arkansas statute. If it deprives Blocker of the use of his prop-

erty on his giving a mortgage on it, without giving him any opportunity to record it, it is to that extent *void*; but if it is construed according to what no doubt was its real intent, it will be held as not applicable.

If we are correct as to its inapplicability, then all the Arkansas decisions construing it are inapplicable, and the court will notice that *all the cases where it is construed the mortgagor was a resident and could have complied with the law*, except Thompson Lumber Co. v. Watson, 49 Ark. 83, which will be noticed later.

But plaintiff's counsel maintain that the statute is applicable to both residents and non-residents. Speaking of a resident they say he was denied the right to record a mortgage in any other county than that of his residence. "He (the resident) then when he got a mortgage on property outside of his county, had to take possession of it *as he would have done before the recording act was passed*" That is a statement that a change of possession was required, before the recording act was passed. That is, that the law requiring a change did not originate with the statute, but was the law before it, or was required by the common law. They (non-resident mortgagors) simply had to take possession of the property instead of being able to record their mortgages. Of course they mean mortgagees holding mortgages given by non-residents. The purport of these statements is that mortgagees had to take possession before the recording act was passed, that is, that the common law required it. They say the recording act also requires it. Then to that extent it is declaratory of the common law, according to that theory. To support these propositions counsel cite no decision, no express statement in the statute nor implication necessary or otherwise.

Was a change of possession required at common law? We call attention to the case of Twyne, found in Smith's Leading Cases and fully annotated. This case was tried in 1601 and is the first great case on the subject of the presumption of fraud arising from possession after an *absolute* transfer. In that case, one Pierce was indebted to Twyne in the sum of £400 and to C. in the sum of £200. C. brought suit. Thereupon Pierce made a conveyance in secret transferring all his goods without exception to Twyne and remained in possession using and trafficking with them, shearing the sheep and marking them in his mark. After C. got judgment, execution was issued and Twyne and his friends resisted the officer who came to levy. Whereupon Coke, Queen's Attorney-General, made information against Twyne for making and publishing a fraudulent gift of goods. On the trial the question was, whether this gift (referring to the deed or transfer) was on the whole matter, fraudulent and of no effect by the Act of 13 Eliz. or not. On the trial it was resolved that this gift had the following signs and marks of fraud, namely: first, the gift was general without exception of his apparel or anything of necessity; second, the donor continued in possession and used them as his own, and by reason thereof he traded and trafficked with others and defrauded and deceived them; third, it was made in secret; fourth, it was made pending the writ; fifth, here was a trust between the parties for the donor possessed all and used them as his proper goods, and fraud is always appareled and clad with a trust and the trust is the cover of fraud; sixth, the deed contained that the gift was made honestly and truly and *bona fide*, and unusual expressions always excite suspicion.

In this case, it is said that the gift had the signs and marks of fraud. Not that it was *per se* fraudulent, but that it had six badges or marks indicating fraud, one of which was that Pierce, after making the absolute gift in payment of his debt, remained in possession and used the property he had transferred as his own and traded with it and sheared the sheep and marked them in his mark. Possession was only *one* among six marks indicating fraud. Now if these six badges of fraud were the special findings of a jury, our courts would hold the gift fraudulent. The Blocker mortgages have not a single one of these badges of fraud, and right here let us say that unless they are fraudulent *per se* and admit of no explanation interpleader must recover for plaintiffs admit that in this case there are no badges of fraud, nor fraud, and that the mortgages were made in good faith to secure an honest debt.

The next case in order is Stone vs. Grubham, 2 Bulstrode, a synopsis of which is found in section 18, Pierce on Fraudulent Mortgage of Merchandise. In this case Lord Coke and his associates held that an *absolute* conveyance of a lease for years unaccompanied by possession was fraudulent, but if the deed of conveyance be *conditional* there, the vendors remaining in possession does not avoid it, because by the terms of the conveyance the vendor is not to have possession until he has performed the condition.

The leading case on this subject, and one that has sometimes been misunderstood, is Edward vs. Harben, reported in 2 Term Report, 587. In this case Tempest Mercer was indebted to Harben in the sum of £191, and to Edwards in £22. Mercer offered to Harben a bill of sale of his goods, household furniture and stock in

trade. Harben refused to accept it unless he should be allowed to enter upon the effects and sell them after fourteen days, to which Mercer agreed, and an *absolute bill of sale* executed, and Mercer left in possession. Before the fourteen days expired Mercer died and Harben entered and took possession. Edwards brought suit against Harben as executor *de son tort*, and the question to be decided by the court was whether the bill of sale was void as against the creditors of Mercer or not. Justice Buller, in delivering the opinion, among other things, said:

> "So long ago as in the case of Bulstrode (Stone vs. Grubham) the court held that an *absolute conveyance* or gift of a lease for years, unattended with possession, was fraudulent, but if the deed of conveyance be conditional, then the vendors continuing in possession does not avoid it; because by the terms of the conveyance the vendor is not to have possession till he has performed the condition. Now, here the bill of sale was on the face of it *absolute* and to take place *immediately*, and the possession was not delivered, and that case makes the distinction between deeds or bills of sale which are to take place immediately and those which are to take place at some future time. For in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed. That case has been universally followed since."

Further on Judge Buller, says:

> "This has been argued by the defendant's counsel as a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law. That is the point we

> have considered, and we are all of opinion that if there is nothing but the *absolute* conveyance without the possession, that in point of *law* is fraudulent. On the other hand, there are cases where the vendor has continued in possession and the bill of sale has not been adjudged fraudulent if the want of immediate possession be consistent with the deed. Such was the case of Kadogan vs. Kennett, Cowper, 432, because there the possession followed the deed. So also the case of Haslington vs. Gill."

This last case was decided by Judge Buller three years before Edwards vs. Harben. In that case Justice Buller said:

> "Possession alone is not evidence of fraud, but that the transaction must be shown to be fraudulent from other circumstances."
> May on Fraudulent Conveyances, p. 121.

In Latimer vs. Batson, 4 Barnwell and Cresswell Eng. Com. Law Rep.) Abbott, C. J. (afterwards Lord Tenterden), said:

> "The question of possession is one of much importance, but that is with a view to ascertain the good or bad faith of the transaction," May, Fraud. Con. 119. In Arundell vs. Phipps, 10 Vesey, 139, 145, Lord Eldon said that "the mere circumstance of the possession of chattels, however familiar it might be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing, until a title not fraudulent is shown under which that possession has followed. That every case from Twyne's case downwards supports that."

Kadogan vs. Kennett was decided by Lord Mansfield in which he says:

> "There are many things which are considered as circumstances of fraud. The statute says not a word about possession. But the law says if after a sale of goods the vendor continue in possession and appear as the visible owner it is *evidence* of fraud," and in summing up he says: "The question therefore in every case is whether the act done was a *bona fide* transaction or whether it is a trick and contrivance to defeat creditors." The transaction was sustained in that case because, as Judge Buller said there, "the possession followed the deed."

In Meggott vs. Mills, 1 Lord Raymond, 286, a bill of sale was made as security for money advanced by the mortgagee to purchase the household furniture of an inn, the mortgagor remaining in possession. The conveyance was assigned, Lord Holt saying:

> "If these goods had been assigned to any other creditor than Wilson (the man who furnished the money) the keeping possession of them had made the bill of sale fraudulent as to other creditors. But since the original agreement was thus, and that honestly and really made for securing the money of the defendant Mills, which he had lent to Wilson for this purpose, the agreements was good and honest."

In Kidd vs. Rawlingson, 2 Bos. and Pul. 59, the case was this: The plaintiff advanced money to one Auburn with which to purchase furniture and took a bill of sale as security, but left Auburn in possession. Lord Eldon upheld the conveyance and said:

> "It appears to me that this case does not fall within the principle of Twyne's case and the other cases on the subject."

He also cites with approval Buller's synopsis of Twyne's case, which Justice Buller concludes as follows:

> "But yet the donor continuing in possession is not in all cases a mark of fraud, as where the donee lends his money to buy goods and at the same time takes a bill of sale of them for securing the money." Buller's *Nisi Prius*, 4 Ed., 1785.

In Hoffman vs. Pitt, Lord Ellenborough said:

> "The not taking possession was in some measure indicative of fraud, but was not conclusive."

May, after reviewing the English authorities on this subject, says on page 123:

> "The result of the authorities appears to establish, that where in strict pursuance of the terms of the agreement or deed actual possession is not given, such want of possession is not *even* an evidence of fraud."

In Bissell vs. Hopkins, 3 Cowan, Judge Cowan reviews in a note most of the English authorities. Any number of cases could be cited, but we deem it useless, but commend to the court, Jones on Chattel Mortgages, chapter 8, sections 309-332.

This question has been passed upon by this Court. In Hamilton vs. Russell, 1 Cranch 310, Chief Justice Marshall says:

> "Modern decisions have taken this question up on principle and have determined that an unconditional sale, where the possession does not accompany and follow the deed, is with respect to creditors on the sound construction of the Statute of Elizabeth a fraud, and should so be determined by the court. The distinction they have taken is between a deed purporting on its face to be *absolute*, so that the separation of the possession from the title is incompatible with the deed itself, and a deed made upon condition which does not entitle the vendee to immediate possession."

He then quotes with approval the doctrine and distinction given by Judge Buller in Edwards vs. Harben. In the case of the United States vs. Hooe, 3 Cranch, p. 89, Marshall, J., says:

> "In the case of Hamilton vs. Russell this court declared an *absolute bill of sale* of a personal chattel of which the vendor retained the possession to be a fraud. But the difference is a marked one between a conveyance which purports to be absolute and a conveyance which from its terms is to leave the possession in vendor. *If in the latter case the retaining of possession was evidence of fraud no mortgage could be valid*, the possession universally remains with the grantor until the creditor becomes entitled to his money and either choses or is compelled to exert his right."

In Conrad v. The Atlantic Ins. Co., 1 Peters 386, Judge Story says:

> "But in cases where the sale is not absolute but conditional, the want of possession if consistent with the stipulation of the parties, and *fortiori* if flowing directly from them has *never* been held *per se* a badge of fraud. The books are full of cases on this subject."

Thus stands the law in this court; except the doctrine that possession after an absolute sale is fraud *per se*, has been modified and the question of fraud is left with the jury. Warner vs. Norton, 20 Howard 448.

The doctrine in Arkansas is best stated in Hemstead vs. Johnson, 18 Ark. 134. Judge English says:

> "This case (Twyne's) is a leading case on the subject of the effect of the vendor's continuing in possession after an absolute sale of goods. It has been followed in numerous cases both in the courts of England and of this country. But a controversy has prevailed in the decisions as to whether

the vendor retaining possession in such a case is to be considered as only a badge or evidence of fraud to be submitted to the jury under the direction of the court, and subject to be rebutted by counter testimony, or whether it is to be regarded as such a circumstance *per se*, as makes the transaction fraudulent in law. This court has adopted the rule that possession by the vendor subsequent to the sale does not amount to fraud *per se*, but is merely *prima facie* evidence of fraud subject to be explained. *But this rule does not apply to mortgages and deeds of trust where the grantor by the terms of the deed is permitted to retain possession of the property until default of payment, because in such transfers the possession is consistent with the deed and furnishes no evidence of fraud.*" This case has since been followed every time the question has been raised.

The Blocker mortgages provided that Blocker should keep possession of the cattle and feed them, and not remove them until three days before the maturing of the notes when he was to ship them to interpleader to be sold and the proceeds appropriated on the debt. This possession was consistent with the mortgage and followed directly from it. The eminent authorities referred to, hold that in such a case it was not necessary for interpleader to take possession to protect their claim.

The Supreme Court of Arkansas has never had a case before it where it was called on to decide the question, whether, as a non-resident mortgagor could not record, and thus give record notice, he might not give actual notice, and in the event he could not give record notice, and actual notice was insufficient, he would be compelled to deliver possession to the mortgagee. These are the very questions in this case. Where is the statute or decision that says that actual notice of a mort-

gage given by a non-resident mortgagor is sufficient. *The Thompson Lumber Company case does not touch the question of actual notice. It does not touch upon the effect of possession being retained by the mortgagor.*

Before examining critically the case of Thompson Lumber Company, we quote from Boyd vs. Alabama, 94 U. S. 648, as follows:

> "Courts seldom undertake in any case to pass upon the validity of legislation where the question is not made by the parties; their habit is to meet questions of that kind when they are raised, but not to anticipate them. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when the question is presented."

In Thompson Lumber Company case there is only one question submitted and one decided, and that was, was the foreign mortgagor corporation a resident of Arkansas, and in Clay county, where it was engaged in business and where the mortgage was recorded? If it was, the mortgage was good under sections 4742 and 4743 Mansfield's Digest. If it was not, the record in Clay county did not make good, because the statute 4742 and 4743 which was the one which the court was considering, required the mortgage to be recorded in the county of the residence of the mortgagor. On the question of residence alone, did counsel cite authorities in his brief. The whole argument of the court was to establish the proposition that a foreign corporation could not have a residence outside of the state that created it. The court after establishing this proposition says:

> "The Thompson Lumber Company *then was not a resident of this state.* We *therefore* conclude that the mortgage sued on was not valid against creditors who sued out execution, etc."

It does not say that in such cases in the absence of record notice actual notice might have been given, but was not, nor that remaining in possession made the mortgage fraudulent *per se*, for these points were not raised. Nor does it appear whether or not the possession was provided for in the deed and followed it. It seems that counsel and court seemed to think that there was but one question, viz.: that of residence and proper record in the case, and that upon the determination of that, judgment should go the one way or the other.

If the statute has the effect claimed for it by plaintiffs it deprives non-resident mortgagors of the valuable right of the use of their property, after mortgaging it, without due process of law, and is in violation of article 4, section 2, Constitution of the United States. The court will notice there is no alternative given in the statute. It simply says record, or suffer the consequences. If it is intended to apply to non-residents it requires of them an impossibility, and is therefore as to them void. In the case of Dells vs. Kennedy, 49 Wis. 555, decided by the Supreme Court of Wisconsin, June, 1880 it is held that,

> "A statute which without regard to its possibility or impossibility in any case, requires as a prerequisite to the exercise of the right to vote, the previous registration of the elector is unconstitutional."

In the body of the opinion the court says:

> "This law undertakes to do what no law can do, and that is to deprive a person of an *absolute right*, without his *laches*, *default*, *negligence* or *consent*, and in order to enjoy it to require of him an *impossibility*."

It is claimed that there are some Arkansas decisions which indicate that in the absence of record possession by mortgagee would have the same effect. In Applethwaite vs. Harrell Mill Company, 49 Ark. 281, Chief Justice Cockrill, after stating that the mortgage was never recorded (the mortgagor was a resident and could have recorded), says:

> "It was a valid security between the parties nevertheless, and after conditions broken between them became a legal title, and when the mortgagees took possession of the mortgaged property by virtue of it they had the same right to hold it against the subsequent attachment of appellees that any preferred creditor has to retain the property of his debtor that has been delivered to him in pledge or payment. Taking possession by the mortgagees by virtue of the mortgage was an appropriation by them of the mortgaged property to the mortgage debt, with the debtor's consent, and their *title* was good against subsequently acquired rights."

Has it occurred to plaintiffs' counsel that this is very old law, that it had been the law for at least five centuries before the recording statute relied on was passed? The court does not connect this possession with the statute. It does not state that possession perfects the *lien* in the absence of record. It does not say that it gives the world *notice* that mortgagees have an interest in the property, nothing of the sort; but simply states an old common law principle, that a mortgagee who has possession of property has the same right to hold it as a *pledgee* would have.

There is no Arkansas decision rendered prior to the adoption of the recording statute that holds otherwise. But there is a case recently rendered by the Arkansas Supreme Court to which I wish to call attention. I

refer to the case of the Bank of Black Rock vs. Decker, 44 S. W. 220. The mortgage in this case was by a resident, and could have been recorded, and, therefore, it was controlled by sections 4742 and 4743, and not by the common law. The court evidently inadvertently used the expression that "the bank did not have such possession as to supply the place of record notice to third parties," for it is in the very teeth of all the Arkansas decisions from Main v. Alexander down, which decisions hold that record notice is the only notice that will avail, and that actual notice is not sufficient, but if the court had said that possession in the bank would have enabled it to hold the property against all subsequent claims, as is said in Applethwaite vs. Harrell Mill Company, there would be harmony in the decisions. In this case the court calls attention to the fact that Decker, the purchaser of the lumber on which the bank had a mortgage, had no notice of the bank's claim. Now when this statute was first construed the supreme court decided that record notice alone filled the requirements of the statute, which is not an unreasonable construction when we notice that the statute requires record in order to have a lien, so as there could be no lien without record, record was found to be the only notice of the existence of a lien, and if a mortgage could not become a lien without record and was not recorded, no amount of actual notice of the existence of the mortgage would do any good, and that is also the reason why the holders of a mortgage given by a resident mortgagor who failed to record when he could have done so, as required by the statute, could only save himself by taking possession. By taking possession he could hold it against all subsequent claims, not by virtue of a lien, for he would have none, but under the

principles named in Applethwaite vs. Harrel Mill Company, which are as old as the common law.

Now if it were possible to have a lien without record, in any case, it would not be necessary to give notice of it by record, for instance in the case of a mortgage given by a non-resident mortgagor. In that case the statute expressly prohibits record, and there is no way under the statute to get a lien except by record; and if the statute is applicable in such cases, it repeals or abrogates the common law which allowed a mortgagor to fix a lien on his property by written mortgage, without record, for there was no registration at common law. We admit the common law was abrogated as to mortgages given by resident mortgagors, for such might be recorded, and a lien created. It is no reply to say that holders of mortgages given by non-resident mortgagors could take possession. The proposition which we are contending for is, that if the statute which denies the right to create a lien by record *compels* such mortgagees to take *possession*, which does not create a lien, then it prohibits non-residents from *encumbering* their property in this territory, and if the legislature can prohibit the encumbering of property, it can prohibit the transfer and sale of it, and by the same power deprive the owner of his property by an act of the legislature. Every citizen has the right to own, use, encumber and transfer property. He has an equal right to each. Who will be so reckless as to seriously say that the statute 4742 and 4743 abrogated the common law as to mortgages except as to resident mortgagors, and repealed sections 3374 and 3375 passed at the same term and compelled creditors to resort to the law of pledges to secure their debts on the property of non-residents situated in the Indian Territory?

The statute of frauds (being sections 3374 and 3375) has been continued in the compilations of Arkansas statutes ever since December 6, 1837. It may be that it is repealed as to chattel mortgages *which may be recorded*, but certainly no further.

Can the mortgage statutes be harmonized with the statute of frauds and the common law? If not, what is the extent of the conflict, and how much of the statute of frauds and the common law on the subject of mortgage liens can stand?

Suth. Stat. Con., section 138, says:

> "Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. The intention to repeal, however, will not be presumed, nor the effect of the repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance."

In section 153, he says:

> "The presumption is stronger against implied repeals where provisions supposed to conflict are in the same act *or were passed at nearly the same time.*"

In section 287, he further says:

> "The legislature are presumed to know existing statutes, and the state of the law relating to the subject with which they deal; hence that they would *expressly abrogate* any prior statutes which are intended to be repealed by new legislation."

The legislature of Arkansnas is presumed to have known of the common law and sections 3374 and 3375 Mansfield's Digest, i. e. the Statute of Frauds, which were the laws governing the rights of mortgagor, mortgagee and the creditors of mortgagor, which had just been adopted and passed, and which were the only

law on the subject until the law requiring mortgages to be recorded was passed on February 20, 1838. This recording act expressly repeals the common law and 3374 and 3375 as to liens and notice as to mortgages given *by resident mortgagors*, but no further. Sections 4742 and 4743 do not cover *all mortgages* but only those given by resident mortgagors; as to these they direct how a lien may be obtained and what shall be notice of that lien, but they do not in express terms or by implication abrogate the law of mortgage liens at common law, nor the law of actual notice except to the extent aforesaid.

If the legislature under the rule of construction just given had intended to repeal the common law of liens and 3374 and 3375 as to *intent* and *actual notice as to all chattel mortgages*, they would have said so in express terms, and would also have made provision for all mortgages to become liens and a way to give notice thereof or have stated what should be done in such a case.

It is a maxim that the reason of the law ceasing, the law ceases. The reason why record notice is the only notice under the Recording Act, is that there is no lien without record, which reason does not apply in any case where there is a lien (as at common law) without record, for giving notice of a mortgage not recorded is worth no more than giving notice of an indebtedness by promissory note, which would be notice of a debt without a lien. Hence the reason of the law, not applying to other liens than those which are created by record, ceases, and the law ceases, or rather does not extend to such liens, as are created by contract.

In all cases of the sale and transfer of property, real or personal, in Arkansas in which the transfer is per-

mitted or requested to be recorded, either record notice or actual notice is sufficient. See Section 671 Mansfield's Digest construed in Byers vs. Engles, 16 Ark., 543. In speaking of registration as notice (not as creating a lien) the Supreme Court of Arkansas in Ghio vs. Byrne, 59 Ark., p. 292 says:

> "The act of registration is for the benefit of persons in the situation of appellant, in this: that it furnishes them notice of the existence of prior inconsistent claims to their own. In this case had there been no registration, and nothing in lieu thereof, still the appellant was affected with notice otherwsie of this mortgage, and that is all the benefit that registration could have afforded him."

This gives the object of registration and it is of universal application except as to liens created by record, of which nothing but a record was evidence and notice of the lien.

For these reasons we conclude that sections 4742, 4743 and the common law and sections 3374, 3375 being *in pari materia* as to liens and notice can be harmonized and all stand, by considering the common law and sections 3374, 3375, no further abrogated and repealed than to require mortgages given by *resident mortgagors* to be recorded in order to be a lien, and to make the record which created the lien, the only evidence and notice of its creation and existence.

This is a case of first impression. No case has ever been before this court or the Supreme Court of Arkansas in which all the points involved in this case were raised or passed on, nor has each or any of the points raised in this case been raised and passed on in any case or cases. There is no precedent to bind this court.

This court is for the first time called upon to decide whether or not there can be a mortgage lien given

by a non-resident mortgagor since the adoption of sections 4742, 4743. This is the first time the court has been called on to decide whether a mortgage lien *can under any circumstances* be created *by contract without record*, and whether actual notice of such a lien, if there can be one, is sufficient to prevent plaintiff from gaining priority by levy.

In this case good faith has characterized all the transactions between Blocker and interpleader, and plaintiffs admit that they had actual notice of interpleader's mortgage before they brought suit. Plaintiffs were not misled by Blocker's possession nor damaged thereby. Their debt was many years older than interpleader's and credit was not extended to Blocker by plaintiffs on the strength of said possession.

Take another view of this question.

The original object of the recording act was to give publicity and notice to conveyances of real estate in oreder to prevent fraud and secret trusts, and the same objects furnished the reason for the statute providing for the recording of chattel mortgages. The same may be said of the Statute of Frauds and Fraudulent Conveyances.

By the statutes of nearly all the states it is provided that where a mortgage is not followed by an *actual and continued change of possession*, it must be recorded; otherwise it is void as to creditors purchasers, etc. (20 Ency. Law, 537, and authorities there cited; 1 Cobbey on Chattel Mortgages, 494.) The general statement contained in the words on mortgages and in the Supreme Court decisions, that *possession* of the mortgaged property by the mortgagee takes the place of, or is equivalent to,

registration of a chattel mortgage, arises from the language of the statutes themselves and not from any common law doctrine that a mortgage to be valid must be followed by possession.

It would serve no good purpose to review all of these decisions which are cited by the text writers in support of this general proposition. We assert that an examination of the numerous cases upon this subject will show the statement above made to be correct. Upon this subject Mr. Cobbey says, Vol. 1, sec. 511:

> "To meet the demands of business and trade, it seemed to be necessary to give to the owner of personal property some better way of using it as a guaranty for the faithful performance of a contract than by the old way of pledge. To meet this demand, the different states now provide that mortgages of some or all classes of chattels may be made, and to permit the mortgagor to remain in possession, provide for a record, which record shall impart notice to the world, and take the place of the actual notice which would be imparted by an actual and continued change of possession."

Thus it will be seen that the phrase "actual and continued change of possession" used in most of the statutes means that notice arising from possession is thereby made as conclusive under such statutes as the record of a mortgage.

Prima facie presumptive notice is, generally, by the several chattel mortgage acts, which in express terms make possession equivalent to recording, made *conclusive*, but not by the Statute of Arkansas.

Mansfield's Digest, section 4743, provides:

> "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's

office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Now, by these plain terms, no chattel mortgage can constitute a lien unless it is recorded. There is no provision of the statute which makes an exception in cases where there is an actual and continued change of possession, and unless the mortgage is recorded, the terms of this statute prohibits it from being a lien absolutely, as well between the parties as to third parties. But it has been held by the Supreme Court of Arkansas that this statute does not prohibit such lien as between the parties. This was first so held in the case of Main vs. Alexander, 9 Ark. 112, and the Supreme Court there say:

> "The language of the act, it must be conceded, is exceedingly broad and comprehensive, and if taken in a strictly literal sense, would doubtless warrant the construction contended for by the appellants. We can not conceive that the legislature ever entertained the idea of changing, or in any manner affecting, the nature of a mortgage as between the parties to the contract. The rights of the parties to a mortgage, whether acknowledged and recorded or not, are precisely the same as they were before the passage of the act referred to, and the only real difference consists in the fact that although actual notice may be shown, it will constitute no answer to the demands of strangers, and that nothing short of an actual filing for record will be recognized as such a notice as to affect his rights."

And thus, by construction, the Supreme Court of Arkansas engrafts into the chattel mortgage act the provisions "as against third parties." So that in the case of Watson vs. Thompson Lumber Co., 44 S. W. Rept. 63, the rule is stated to be:

> "That a mortgage is good between the parties thereto, though not acknowledged and recorded, but constitutes no lien upon the mortgaged property as against strangers unless it is acknowledged and recorded, even though they may have actual notice of its existence."

Later, in the case of the Bank of Black Rock vs. Decker, 44 S. W. Rep. 220, it was contended by the bank that possession had been delivered to it, and that thereby the necessity of record was obviated, and it was held that the evidence showed only constructive possession, which was held not sufficient. After reciting the facts, Reddick, J., speaking for the court said:

> "Under these circumstances, we are of the opinion that the bank did not have such possession of the lumber as to supply the place of record notice to third parties. The bank should either have recorded its mortgage and thus given notice of its lien, or it should have taken and retained actual possession of the lumber in order that subsequent purchasers might not be misled. * * * As the bank did not have possession of the lumber, and as its mortgage was not recorded until after the transfer to Decker, the mortgage did not affect him."

Citing Dodd vs. Parker, 40 Ark. 536; Martin vs. Ogden, 41 Ark. 186.

In Dodd vs. Parker, the Supreme Court said that:

> "It has been universally held in this State that an unrecorded mortgage, or one which has been improperly admitted to registration, constitutes no lien upon the mortgaged property as against a stranger, notwithstanding he may have actual knowledge of its existence."

Thus, it appears from the quotations above that the language of the Statute of Arkansas, and the language

used in Dodd vs. Parker, is further modified in Bank vs. Decker, so that the notice resulting from actual possession would be equivalent to that resulting from registration. Why is notice by record and notice by possession placed on a parallel? There is nothing in the words of the statute to authorize it, and so far as we have been able to ascertain, there is nothing in any other statute which authorizes it, unless effect be given to the statute of frauds, section 3375, Mansfield's Digest.

But whatever the reason may be, since the statute does not give any efficacy to a change of possession, it necessarily follows that if the notice flowing from the fact of possession in the mortgagee is engrafted on to the statute by construction, any other actual notice should likewise be engrafted on to the statute.

And Since the statute doesn't recognize it as equivalent to record, it follows that there can be no reason for holding that possession takes the place of the record of a chattel mortgage, except upon the doctrine that it imparts notice of the mortgagee's rights, independent of the statute. The actual notice flowing from the reading of the mortgage itself, stands upon as high a plane as that flowing from possession, in absence of statute to the contrary.

Therefore, in reason the engrafting onto the Arkansas Statute the doctrine that possession is equivalent to registration, engrafts the whole doctrine of actual notice. They must stand or fall together. The interpleader therefore in reason would have been in no better position had actual possession been taken.

But the statute prohibits the mortgage from becoming a lien at all, until it is recorded or filed for record in the county of the mortgagor's residence. Was it

ever intended by the legislature to require the doing of an impossible thing, and to attach a penalty, the deprivation of the right of contract, as a consequence of not doing that thing? Manifestly not. Now, the legislature did not in terms provide that non-residents could not record their mortgages, but simply failed, probably through inadvertence, to provide a place to record a chattel mortgage given by a non-resident. Can it be reasonably held that by this failure the legislature meant to prohibit a non-resident from exercising and having these rights of contract as they existed prior to the passage of the law providing for the registration of chattel mortgages? That is, did the legislature, by the failure to provide a place for registration for a non-resident owning property in this state, thereby denying him the benefits of notice flowing from the recording of a mortgage, intend also to deprive him of the right to give a mortgage and have the actual notice in a bona fide transaction as it would have existed at common law, when it would have been so easy to have so declared in express terms? To so hold is contrary to all of the cardinal principles of statutory construction, and leads as we conceive, to an absurdity, and so construes the law as to make it unconstitutional. In the case of the State of Arkansas vs. Smith, 40 Ark. 431, construing some other terms of the chattel mortgage law, the Supreme Court of that state, said:

> "Any construction should be discarded that would lead to absurd consequences."

In the case of Lau Ow Bew vs. U. S., 144 U. S. 47, Chief Justice Fuller, delivering the opinion of the court, says:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will

effectuate the legislative intent, and if possible so as to avoid an absurd conclusion."

See also Harles vs. U. S., 88 Fed. Rep. 97.

Now, applying these cardinal rules of construction to the Statutes of Arkansas, it seems to us that the necessary conclusion to be drawn is that while the statute is effective as to mortgages of residents, *no provisions being made for recording a chattel mortgage given by a non-resident upon his property situated in that state, it cannot be extended by construction in absence of language to warrant it, to prohibit the exercise of that valuable right of contract as it had previously existed at common law, and therefore as to such mortgages the common law was left in force*, and if bona fide they would be valid as to all parties with notice though unrecorded.

So far as we have been able to observe, the Thompson Lumber case is the only case supporting the proposition that a non-resident is prohibited from making a chattel mortgage in the State of Arkansas, and that proceeds upon the idea that because the statute fails to provide for a place of record, it amounts to such a prohibition, and in support of this decision is cited Smith vs. Moore, 11 N. H. 63; Bither vs. Buswell, 51 Maine, 602; Cook vs. Hager, 3 Col. 386; Stewart v. Platt, 101 U. S. 731; Briggs vs. Leitelt, 41 Mich. 80; 1 N. W. Rep. 942, to which authorities the court of appeals for this territory on a former appeal of this case added Jones on Chattel Mortgages, 261; Cobbey on Chattel Mortgages, 578.

Quoting from the language of the section of Jones on Chattel Mortgages cited, the court said:

> "In case the mortgagor resides out of the state under a statute which provides for a recording of

> a mortgage at the mortgagor's place of residence, and does not provide for recording it in the place where the mortgaged property is situated, there can be no effectual record of the mortgage, and therefore the only effectual mode of making the mortgage is for the mortgagee to take and hold possession of the mortgaged property."

Now, in support of this proposition, Mr. Jones cites 11 N. H. 55. Mr. Cobbey, section 578, cites the same cases above referred to, as well as Montgomery vs. Wright, 8 Mich. 143.

That there can be no effectual record of the mortgage in cases where there is no provision for recording the same, there can be no doubt; but we assert that it is not competent for the legislature, if it chooses to do so, to enact a law prohibiting non-residents from making chattel mortgages on their property situated within the state, and therefore they should not be presumed by intendment to have done that which was beyond their power, and which they did not do by direct enactment. It may be said that the case of Watson vs. Thompson Lumber Company does not hold that non-residents can not make a mortgage. True it does not so hold, but it does hold, and correctly, that the legislature had not given to non-residents the right to record a mortgage, and thus procure the benefits of the notice flowing therefrom. We contend that the statute not having made any substitute for the notice which registration would give, and not having in terms prohibited a non-resident from giving a chattel mortgage, actual notice would be as effectual as it would have been at common law.

The question of actual notice was not raised in the case of Watson vs. Thompson Lumber Co., so far as the opinion shows but it lays down the rule that actual

notice did not take the place of record, citing a line of Arkansas cases, all of which being cases in which the mortgagor was a resident of the state, and could have complied with the law, have no application.

We maintain that the expression in the language quoted from Jones on Chattel Mortgages:

> "And therefore the only effectual mode of making the mortgage is for the mortgagee to take and hold possession of the property,"

if supported by the authorities cited is not applicable, but we do not think it is supported by the authorities.

In the case of Smith vs. Moore, 11 N. H. 63, the court say (p. 63):

> "By the provisions of that act no mortgage of personal property subsequently made is valid against any other persons than the parties to it, unless the possession of the property be delivered to and retained by the mortgagor, or unless the mortgage is recorded in the office of the clerk of the town where the mortgagor resides at the time of its execution."

Under this satute the conclusions as to its effect is stated (p. 64) as follows:

> "To protect the property against creditors where the mortgagor resides out of the state, the mortgagee must take and retain possession, UNLESS PERHAPS IN CASES OF ACTUAL NOTICE."

In the case of Montgomery vs. Wright, 8 Mich. 143, the policy of the law of that state is stated (p. 149) as follows:

> "This provision for filing or registration is not intended by any means to encourage or legalize the practice of making mortgages without change of possession. The statute now, as before, regards change of possession as the rule, and allows filing

to dispense with its necessity, because filing is public notice, but we can not suppose that either statute was designed, or can be properly construed, to dispense in any case with filing and change of possession also. If a chattel mortgage of property here is made by a non-resident, our law contains no provision for filing it. In such a case a change of possession is therefore essential and can not be dispensed with against creditors or purchasers."

Thus, it will be seen that by virtue of the statute that a change of possession is made necessary, and the language above quoted shows that registration was intended merely as a substitute for a change of possession, while under the Arkansas statute registration is provided for, except in case of non-residents, and nothing is said in regard to a change of possession, therefore registration is the rule in Arkansas, with no substitute whatever provided by statute; hence, the Michigan case can not be held to apply. And from the language quoted from the New Hampshire case, it will be seen that a change of possession was provided for as a substitute for registration, and in addition to that, in case of a non-resident, it is in effect held that actual notice would be sufficient. It will be noted that the mortgagor resided in Canada, so the constitutional question as to privileges and immunities could not arise.

It is apparent that the case cited in 3 Colorado is not applicable to the case at bar, for the reason that section 10 of the Chattel Mortgage Act of that state contains a saving clause as to the failure to record the mortgage when an adverse right to the property is acquired with *actual notice* of the existence of the mortgage.

The other cases cited in Watson vs. Thompson Lumber Company refer merely to the rule that actual notice can not take the place of a *record* or *change of possession* in cases where the statute makes the mortgage void without one or the other, and in none of the cases is there any statute similar to that of Arkansas, nor is the question discussed touching the constitutionality of a statute which would prohibit a non-resident from making a chattel mortgage. None of these cases can be considered as authority for holding that the rule *Expressio Unius est exclusio alterius*, can be properly applied to the construction of these statutes of Arkansas, so as to read into them a prohibition against a non-resident making a mortgage which shall constitute a lien.

Endlich on Interpretation of Statutes section 397, says:

> "The maximum in question (referring to that quoted) as applied to the construction of statutes, certainly can not mean that, where one thing is allowed or named, every other thing is forbidden or excluded." * * * *
>
> "And on the other hand, if there is such a rule, it is confessedly liable to so many restrictions and exceptions in its application as to be practically swept away. Indeed, the extreme caution necessary in its application is emphasized wherever it is recognized by writers." * * *
>
> "Indeed, the exceptions would more than swallow up the rule; for, under it, there could be no such thing as implication or liberal construction, nor could there be any cumulative remedies where a statute undertakes to give a remedy."

In a note on page 560 of the same work it is said:

> "The effect of this rule is practically that general legisation on a particular subject must give way to special legislation on the same."

We therefore, believe that this maxim can not be applied in this case, further than to hold that as the law of Arkansas provides for the record of a mortgage in the county of the residence of the mortgagor, it therefore excludes the idea that a mortgage given by a non-resident can be recorded at all. But resort to this maxim is not necessary for this conclusion, because the recording acts can alone be looked to to determine the place of record, and the absence of any statute as to the place is equivalent to a denial of the right to record. It seems to us wholly incorrect to say that this maxim can be applied so as to construe the Arkansas statute as a repeal of the common law as those mortgages which are not provided for at all in the statute, but which are in fact prohibited from being recorded, not by positive enactment, but because no place is provided for such registration. This conclusion is enforced by considering that to hold that the common law was repealed in so far as it applies to non-resident mortgages, and the right to mortgage given to residents, but prohibited to non-residents, would be in violation of the Constitution of the United States, granting equal privileges and immunities, and United States Revised Statutes, article 1977-1978, upon same subject.

We therefore conclude from what has been said, that it was not the intention of Congress, expressed or implied, when it adopted Mansfield's Digest upon the subject of mortgages, to repeal or modify the common law as to mortgages by non-residents—there was simply no legislation applicable thereto, nor was it intended to thereby provide that possession would take the place of registration.

The terms of the statute adopted, neither by implication or otherwise, so provide, unless construed in connection with the Statute of Frauds, in which case any other form of actual notice is as effectual as that flowing from possession.

It is contended by counsel for plaintiff that the case of Watson vs. Thompson Lumber Co., having been decided before the Arkansas Statute was adopted by congress, therefore congress adopted this statute with the construction there placed upon it. The rule upon the subject of the construction placed upon adopted statutes is correctly stated in the syllabus (which is made the law in Oklahoma) in the case of Smith vs. Baker, 49 Pacific Rept., 61, by the Supreme Court of Oklahoma, as follows:

> "Where the legislature of one state or jurisdiction adopts a statute in force in another jurisdiction, which has already received a construction in its courts, it is presumed to adopt the construction thus given; but, to sustain the presumption, such construction must have been placed thereon by the highest judicial tribunal authorized to pass upon the question, and such construction must have been so long established as to have been known, or so long that it reasonably might have been known, to the legislature adopting it."

See also Sanger vs. Flow, 1 C. C. A. 56; Willis vs. Eastern Trust Co., 169 U. S. 295.

We do not think that it had become the *known* and *settled* construction that the common law would not apply to a mortgage given by a non-resident person, so as to invoke a presumption depriving this court of the right to construe for itself the adopted Statutes of Arkansas upon this particular point as presented in this record.

See, to the same effect, Coullam vs. Doul, 133 U. S. 216. Also the case of Bowers vs. Smith, 111 Mo. 45, l. c. 52, where, the Supreme Court of Missouri, in interpreting a statute adopted from another state, said:

> "It must be remembered that its adoption here brings it into subrogation to the fundamental law of Missouri, and that prior decisions elsewhere construing enactments on the same general topic, can not properly be followed if inconsistent with that fundamental law."

Mr. Endlich, in his work on the interpretation of Statutes, p. 518, speaking upon this subject, says:

> "And it is manifest that the imported construction should prevail only in so far as it is in harmony with the spirit and policy of the general legislation of the home state, and should not, if the language of the act is fairly susceptible of another interpretation, be permitted to antagonize other laws in force in the latter, or to conflict with its settled practice. Nor, where the constitutional requirements of the adopting state are different from those of the originating one, would a construction by the courts of the latter comformable with its constitution, bind the courts of the former not similarly construed."

It seems to us that under these rules, it can not be considered that the case of Watson vs. Thompson Lumber Co., contains a construction of such a character as to be considered as a part of the enactment of congress, or as having been adopted by congress. The U. S. Revised Statutes provide:

> "Sec. 1977. All persons within the jurisdiction of the Unted States, shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws and proceedings for the security of persons and property as is en-

joyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"Sec. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

From these sections of the Revised Statutes of the United States, the policy of congress that the rights of all persons within the jurisdiction of the United States shall be equal under the laws with respect to property and contracts, is clearly manifested, and it certainly can not be contended that in adopting Mansfield's Digest upon the subject of chattel mortgages, as applied to the Indian Territory, congress thereby modified these important statutes. If the Supreme Court of Arkansas had placed a construction upon the adopted statute which would abridge the rights of a citizen under the Constitution of the United States, or under these statutes, manifestly such construction must yield to the policy of the laws of the United States, since it is the duty of the court to adopt such construction as will make the statutes consistent with the supreme law.

Grenada Co. vs. Brown, 112 U. S. 261.

Of course it does not follow from this argument that congress intended to confer the right of recording a chattel mortgage upon a non-resident of the Indian Territory, but *it does follow that since the chattel mortgage act does not, by its terms, prohibit a non-resident from making a chattel mortgage on his property situated in the Indian Territory, nor provide for the registration thereof, that Congress did not intend to de-*

prive citizens of the United States of the right to so contract, as that right existed at common law; nor to deprive them of the benefits flowing from actual notice, simply by referring the benefits of record notice to residents.

It must be observed that if the Arkansas Statutes are to be construed as prohibiting a non-resident from making a bona fide chattel mortgage which shall be valid at common law, he is deprived absolutely of the right to mortgage. It may be contended that where possession is taken, the mortgage becomes valid. This may be true, but under the Arkansas Statute it is not by virtue of it being a mortgage lien, for the statute declares that the mortgage shall not constitute a lien until it is recorded. If it becomes valid by possession it is because it becomes a *pledge* and would be treated as such.

Does not the construction contended for by the plaintiff in this case deprive a non-resident absolutely of the right to make a mortgage? If the mortgage becomes valid by possession in the mortgagee, it becomes a pledge, hence, must make a pledge or nothing, until condition broken, then if the mortgagee takes possession it places in him full title, provided there are no intervening rights.

Our conclusion therefore is: That Congress can not be held to have intended any such consequence. It is an absurdity, it is unreasonable, it is inequitable, it is contrary to the Constitution and Statutes of the United States, and the policy of Congress with reference to citizens of the United States, and where such construction of a statute, as is contended for by respondents, leads to such consequences as we have heretofore referred to, that construction will not be adopted unless

from the plain wording of the statute no other construction is possible, but the courts will adopt the construction agreeable to the rule announced in the case of Washington and Idaho Ry. Co. vs. Coeur d'Alene Ry. and Navigation Co., 160 U. S. 77, viz.:

> "When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are possible, to adopt that one which equity would favor."

It is contended by counsel for plaintiffs, that the Constitution of the United States does not in anywise limit congress in enacting legislation with reference to persons or property in the Indian Territory.

If this claim is conceded (though it is not conceded), still this position does not meet our contention that the legislature of Arkansas did not have the power to prohibit the right of contract by a non-resident, with respect to property situated in that state; and it does not meet our contention that the legislature of Arkansas did not purport to prohibit such a contract; and it does not meet our contention that previous to the adoption of the Arkansas statute there was not a *known settled* construction thereof whereby these laws were held to prohibit a non-resident person making a mortgage, as at common law, valid as to strangers having actual notice; and it does not meet our contention that if such construction had been placed upon these statutes it would not be binding because contrary to the policy of national legislation with respect to citizens of the United States; and it does not meet our contention that Congress, by Sections 1977 and 1978, U. S. R. S., extended the constitutional provisions so as to apply the equal protection of the laws to persons and property wherever situated; and it does not meet our contention that in adopting the Statutes of Arkansas, Congress in

no wise intended to repeal or modify these sections of the Statutes of the United States referred to; and it does not meet our contention that if the statute, as it existed in Arkansas, and as construed by their courts, rendered non-residents a "proscribed" class, and was therefore unconstitutional, that Congress could not be held to have intended to adopt such a construction.

The actual conditions in the Indian Territory, which were known to Congress at the time of the passage of the act putting in force the Statutes of Arkansas, must not be overlooked; that the cattle business was the chief industry of the Territory, and hundreds of thousands of cattle, in that Territory, owned by non-residents and grazing therein were, by the common custom and practice, articles of commerce and contract by mortgage and otherwise. This condition was well-known, and it is hard to believe that there should have been any *actual intention* on the part of Congress to grant to a resident of the Indian Territory the right to contract with reference to *their* cattle, which constituted the small proportion of property of this character in the Territory, and at the same time to prohibit non-residents from making similar contracts, just as effective for the purpose of commerce. The controversies with reference to the grazing of cattle of non-residents in the Indian Territory, at the time of the passage of the act referred to, was the subject of constant discussion by the Interior Department of the Government and the committees of Congress having under their control the consideration of Indian affairs. In view of all of which, and looking to the conditions of that Territory, and to the fact that Congress has amended the law so as to grant the right of registration to non-residents, every presumption will be indulged that Congress had

no such *actual intention*, and as it did not express such intention, the laws which it was adopting should not be construed as is contended for by the counsel for the plaintiffs. Looking to the language of these Statutes of Arkansas, such construction can not be drawn therefrom; we call attention to the language of section 31, chapter 182, of an act of Congress putting in force certain chapters of Mansfield's Digest, whereby they (Ark. Statutes), are limited thus, viz.:

> "Which are not locally inapplicable or in conflict with this act, or with the laws of Congress relating to the subjects specially mentioned in this section, are hereby extended," etc.

The rule of *stare decisis* can not have the effect of precluding this court from adopting such construction as it may find was manifestly the correct one. Sutherland on Statutory Construction says (sec. 316),

> "This rule has never been carried so far as to preclude courts from investigating former decisions when the question has not undergone repeated examination and become well settled."

See to same effect, Ency. Law, vol. 23 p. 36.

The subject was clearly elucidated in the case of Murray vs.. C. & N. W. Ry. Co., 92 Fed. Rept., 868, opinion by Caldwell. It was contended in that case that an exception to the bar of the statutes of limitation existed in cases of undiscovered fraud; that while the statutes of limitation did not expressly make such exceptions, still, the Supreme Court of Iowa had so held in several cases, and it was contended that the U. S. Circuit Court must follow those decisions, but it was held that the U. S. Courts determine for themselves what the common law is, and are not bound by the decision of the supreme court of the state, engrafting

an exception onto the statute, where, by the rules [of construction] of the common law the court is not authorized to engraft such exceptions. The authority of the court to engraft anything nto the statute in such a case will depend upon the construction under the rules of the common law; and this, the federal courts determine for themselves.

Hence, our conclusion is that the common law was the law of the Indian Territory with respect to the mortgages given by Blocker to the interpleaders, and being bona fide, and that actual notice thereof by the reading of the mortgages being communicated to the attaching creditor, they constitute a superior lien to that of the attachment of the respondents, and that therefore judgment should go for appellant.

There is another view to take of this question:

The plaintiffs' debt was contracted long before interpleader's mortgages were made. Plaintiffs advanced no money, gave no credit and lost nothing by these mortgages, but on the contrary it would work a fraud on interpleader if plaintiffs can now come in and take the attached property.

In the case of Ferguson v. Edrington, 49 Ark. 241, the court said:

> "A bona fide purchaser has been defined to be one who at the time of his purchase advances a new consideration, surrenders some security or does some act which leaves him in a worse position if his purchase should be set aside and purchases in the honest belief that his vendor has a right to sell without notice, actual or constructive, of any adverse rights, claims, interests or equities of others in and to the property sold."

In Union National Bank v. Oium, 54 N. W. Rep. 1034, there was a contest between an attaching creditor of chattels and the chattel mortgagee thereof whose mortgage had been executed before, but not recorded until after, the levy of the writ of attachment. The debt for which the attachment had been run was contracted before the giving of the mortgage. The Court, in its opinion, set out the statute of the state of North Dakota, which is as follows:

> "A mortgage of personal property is void as against creditors of the mortgagee and subsequent purchasers and incumbrancers of the property in good faith for value unless the original, or an authenticated copy thereof, be filed in the office of the register of deeds of the county where the property mortgaged or any part thereof is at such time situated."

The court then says:

> "We hold that as the debt for which the attaching creditor seized the property was a debt contracted before the execution and delivery of the mortgage and as it does not appear that the creditor after the giving of the mortgage and before it was filed in any manner altered his position to his detriment, the mortgage lien is paramount even assuming that a valid levy was made before the mortgage was filed."

To the same purport is Overstreet v. Manning, 67 Tex. 657.

In Argall v. Seymour, 48 Fed. Rep. 548, Judge McCrary held that a chattel mortgage, not recorded for thirty days, is good as against an attaching creditor whose debt accrued prior to the mortgage, but invalid as to those accruing subsequent thereto.

Moore v. City, 42 Ark. 66, was a suit to enjoin the collection of taxes. The plaintiff was a purchaser un-

der a defectively acknowledged mortgage, and the city attempted to defend on the ground that plaintiff got no title because of such defectively acknowledged mortgage. The court, at page 69, said:

> "The defect in the certificate of acknowledgment is a matter with which the city has not the remotest concern, and of which it can take no advantage. It was not a purchaser for value."

To the same purport is Voglesang v. Fischer, 128 Mo. 404.

In Bank v. Bates, 120 U. S. 564, the same doctrine is maintained.

In Burton v. Sittlington, 128 Mo. 164, the Supreme Court of that state held that as between a mortgagee of chattels and an attaching creditor for a debt accruing prior to the mortgage where the mortgagee did not record his mortgage until after the attachment, that the mortgage was paramount to the attachment lien.

These Missouri cases were referred to by the Supreme Court in delivering its opinion, in Moore v. City, supra, and hence we must conclude their enunciations were adopted by that court.

In Buttons v. Rathbone, 12 N. Y. S. 667, the court held that one who takes a chattel mortgage to secure a pre-existing debt, but parts with no obligation or other rights, is not a mortgagee in good faith within the meaning of the statute of New York, so as to entitle him to a preference over a prior unfiled mortgage of the same chattels.

In St. Paul, etc., v. Berkeley, 55 N. W. Rep. 60, the Supreme Court of Minnesota held that where a chattel mortgage is bona fide, a creditor seeking to establish a superior equity must show that he belongs to the

class of creditors who are entitled to challenge the validity of the mortgage as against them because not duly and seasonably recorded.

And in Littauer v. Houck, 52 N. W. Rep. 464, and followed in the 53 N. W. Rep. 919, the Supreme Court of Michigan held that a chattel mortgage is good as against the mortgagor's other creditors whose claims accrued before the mortgage was executed, though by mistake it was not filed in the proper office.

The authorities are based on the hypothesis that when one seeks to take advantage of an erroneous filing of a mortgage or a failure to file it at all, he must show that he has been hurt.

Here the plaintiff's debt accrued ten years, before the interpleader invested its money in these cattle, and they can not say that the failure of the law to give a place for recording this mortgage was detrimental to them.

II.

Is the statute brought into the Indian Territory by the Act of Congress concerning chattel mortgages in violation of the Constitution of the United States?

The question presented here is: Does the act which declares that no chattel mortgage shall be a lien on the property mentioned until it is recorded in the county or district where the mortgagor resides conflict with that provision of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?"

Now, this act says to the resident of the Territory:

> "*You may mortgage your cattle and may retain possession thereof, and have the care, custody, con-*

trol and management of them. In other words, you may be left in the undisputed possession and right of disposition of your cattle, limited only by the terms of your mortgage."

But to the non-resident, the citizen of the state of Texas, the statute says: "*You may not mortgage your cattle which are in the Indian Territory.*" *Is this granting an equal privilege to the citizen of Texas that is enjoyed by the citizen of the Territory in respect to mortgaging his cattle?*

In Cummings v. Missouri, 4 Wall. 321, the Court said that:

> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in pursuit of happiness all avocations, all honors, all positions are alike open to every one, and that in the protection of these rights all are equal before the law."

Can it be said that the citizens of Texas, when he comes into this territory with the sanction of the government, has all the rights and privileges that the citizen of the Territory has?

Again, the Court in Williams v. Bruffy, 96 U. S. 183, says:

> "This constitutional provision has been held, in repeated adjudications of this court, to prohibit discriminating legislation by one state against the citizens of another state, and to secure to them the equal protection of its laws and the same freedom by its own citizens in the *acquisition and enjoyment of property.*"

Now, it must be admitted that the Texan, who owns property in this Territory, has not all the rights and privileges which are accorded to the resident. He has

not the "equal protection of the law" in "the enjoyment of his property." He does not then stand on the same footing with the resident. This regulation seems therefore to be repugnant to the clause of the constitution mentioned. It is a direct discrimination between citizens of the Territory and those of all other states in respect of an ordinary and extensive branch of dealing. It makes that which is lawful within the Territory for all persons residing therein, to wit: to mortgage their chattels, unlawful for citizens of any other state, and thereby imposes onerous conditions on non-residents which are not imposed upon its own citizens or persons residing within its borders. It makes the discrimination rest upon the very fact which alone determines in the case of citizens of the United States whether a person is or is not a citizen of one state or another, to wit: residence in a state.

The Court, in Ward v. Maryland, 12 Wall., 430, declared that it

> "Would not attempt to define the words 'privileges' and 'immunities' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt these words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state for the purpose of engaging in lawful commerce, trade or business without molestation, *to acquire personal property*," etc.

Blackstone says:

> "The third absolute right inherent in every Englishman is *that of property, which consists in the very use, enjoyment and disposal of all hi sacquisitions*, without any control or diminution, save only the laws of the land."

See also Blake v. Mc. Clung, 172 U.S. 239 & 176 U. S. 59

And in the Slaughter House cases, 16 Wall., 119, Judge Bradley says:

> "But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they are now. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens—the privilege of buying, selling and enjoying property, the privilege of engaging in any lawful employment for a livelihood, the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges, if they did not possess them before. And these privileges they would enjoy whether they were citizens of any state or not. Inhabitants of Federal territories and new citizens, made such by annexation of territory or naturalization, though without any status as citizens of a state, could, nevertheless, as citizens of the United States, lay claim to every one of the privileges and immunities which have been enumerated."

Swayne, J., in speaking of the thirteenth and fourteenth amendments, in that same case, says:

> "These amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven."

It will be noted by a glance at the constitution of the section under consideration is not a restriction upon any state like the fourteenth amendment is. It does not say that no state shall legislate so as to prevent citizens of other states from enjoying all the privileges and immunities of citizens of their own state, but it is a declaration, as I have quoted above from Blackstone, of the fundamental rights recognized by all free men;

it is an inalienable right; a right which every citizen of the United States has, and it is a right, which has been held by this court that neither Congress nor state could invade. On the other hand, the fourteenth amendment declares that no state shall breach these rights, privileges and immunities.

As was stated by Miller, J., in delivering the opinion in the Slaughter House cases:

> "The sole purpose of this amendment (the fourteenth), was to declare to the several states that whatever those rights as you grant or establish them to your own citizens or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In speaking of the article under consideration, viz.: section 2 of article 4, of the Constitution.

Washington, J., in Corfield vs. Coryell, 4 Wash., C. C., 371, said:

> "The privileges and immunities in question are those which are fundamental which belong of right to all citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign," including "protection by the government with the right to *acquire and possess property* of every kind."

In Campbell vs. Morris, 3 H. & McH., 554 the Maryland Court of Appeals, in considering this same question, said:

> "It means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by

> the laws of the state in the same manner as the property of the citizens of the state is protected. It means that such property shall not be liable to any taxes or burdens which property of the citizen is not subject to."

And the Supreme Court of Massachusetts, in Oliver vs. Washington Mills, 11 Allen, 281, speaking through Bigelow, C. J., said:

> "It is obvious that the power of a state to impose different and greater burdens or impositions on the property of citizens of other states, than on the same property belonging to its own citizens, would directly conflict with this constitutional provision."

The legislature of Massachusetts had enacted a law requiring domestic corporations to reserve and pay into the state treasury a certain portion of all dividends declared on shares of non-residents, and the court held the law in conflict with that provision of the constitution.

Cooley, in his work on Constitutions and Limitations, says on page 397:

> "Although the precise meaning of privileges and immunities is not very distinctly settled, as yet, it appears to be conceded that the constitution secures in each state to the citizens of all other states the right to remove and carry on business therein; the right by the usual modes *to acquire and hold property, and to protect and defend the same in law;* the right to the usual remedies for the collection of debts and the enforcement of other personal rights and the right to be exempt, in property and person, from taxes or burdens which the property, or persons of citizens of the same state, are not subject to."

Story on the Constitution, par. 1806, says:

> "It is obvious that if the citizens of each state were to be deemed aliens to each other they could not take or hold real estate or other privileges, except as other aliens. The intention of this clause (of the constitution) was to confer on them, if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizen of the same state would be entitled to under like circumstances."

Among the leading enunciations of the doctrine above maintained is the case of Farmers' Loan and Trust Co. vs. Chicago, etc., 27 F. R. 46, a decision rendered by Gresham, J., in which he held that a statute of Indiana, which declared that all conveyances in trust of real or personal property to a non-resident, except by will, should be invalid, was in conflict with section 2, article 4, of the United States Constitution, and was therefore void. It is a very instructive case, and the learned judge considers at great length section 2 of article 4 of the Constitution. Following that case was that of Roby vs. Smith, 30 N. E. Rep. 1093, also reported in the 131 Ind. 342. That was a decision concerning the same statute, and it was there held by the supreme court of Indiana, that that statute was in violation of section 2 of chapter 4 of the Constitution of the United States.

In rendering the decision in Farmers' Loan and Trust Co. vs. Chicago, etc., *supra*, Gresham, J., used this language in reference to the said Indiana statute:

> "It is a statute which denies to residents of other states the right to take and hold in trust, otherwise than by last will and testament, real and personal propery in Indiana. The right is asserted to deny to persons associations or corporations,

> within or without the state, power to convey to any person in trust, not a resident of Indiana, real or personal property within the state. This is a plain discrimination against the residents of other states. If Indiana may disqualify a resident of another state from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the state might prohibit citizens of other states from holding property within the state, and to that extent from doing business within the state. No state can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States can not be denied the right to take and hold absolutely real or personal property in any state of the Union nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship."

In the celebrated case of Lemon vs. The People, 20 N. Y. 562, the court discusses very fully this clause of the Constitution. Under that clause they said:

> "Citizens of every other state can hold property by the same titles by which citizens of this state may hold it and by no other; and any discriminating legislation which would place them in a worse situation than citizens of this state would be unlawful."

But plaintiffs contend that this Registration Act is but the exercise of the police power of the state.

Let us see:

Police power, the exercise of which is held not to violate the Constitution, is confined to cases where such legislation only becomes a proper subject of state control on account of the necessity of the case, or as it is sometimes called, "The Law of Overruling Necessity."

In this case the question is not one of regulation—it is not one where a non-resident is seeking a right by virtue of the recording acts.

The question here is, did Congress prohibit a non-resident from making a mortgage, and if it did, had it the right to do so under the Constitution?

The power of a legislature over the subject of the recording acts is in all particulars as complete as it is over any other subject not in conflict with some constitutional provision.

In the case of Third National Bank vs. Devine Gro. Co. reported in the 34 L. R. A. 446, the Supreme Court of Tennessee said that:

> "To take from property its chief element of value, and to deny the citizen the right to use and transfer it in any proper and legitimate method, is as much depriving him of his property as if the property itself was taken."

This case shows that notwithstanding the power of the legislature to pass statutes of fraud, and fraudulent conveyances, and restrict the disposition of property by preferences, this power does not extend to it the right to make unreasonable restrictions so as to deprive a person of the right to use his property in the making of legitimate contracts disposing of the same, and, as is shown elsewhere in the briefs in this case, if the construction of the laws of Arkansas, as contended for by the appellant, should be adopted, a non-resident is absolutely prohibited from giving a lien upon his property, however honest and fair the transaction might be. As we have seen, and as will further appear herein, this is not within the police power of the legislature of Arkansas, nor is it within the power of congress under the Constitution of the United

States. If it should be so construed, it repeals, to that extent, Articles 1977 and 1978, Revised Statutes of the United States. It would seem, therefore, that resort could not be had to the police power of congress to uphold this law.

The case of Holden vs. Hardy, 169 U. S. 366, contains an instructive review of the decisions with reference to the power of the state to limit and regulate the right of contract. It is there said:

> "As the possession of property, of which a person can not be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provisions. Indeed, we may go a step further, and say that as property can only be legally acquired as between living persons by contract, that a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property would be equally invalid."

It would seem to us, therefore, that this case does not fall within that class of cases where it is proper to resort to what is known as "Police Power," and that neither the legislature or congress can arbitrarily restrict the right to contract, and it is for the courts to decide whether it has done so or not in each case according to all the circumstances.

Another position taken by plaintiffs' counsel is that though the United States Constitution may limit the power of the states to enact police regulations which might abridge the rights of non-resident citizens, there is no such limitation on congress. In this position he is also at fault.

Congress has only such powers as have been delegated to it by the people through the constitution, and the powers thus delegated are much more limited than are those which are reserved to the states.

The Am. and Eng. Ency. of Law, article on the "Police Powers," says, at page 742:

> "The constitutional provisions which limit the power of the Federal government to that which is expressly delegated to it and the state and Federal constitutions which exclude the state legislatures from the invasion of private and public rights impose peculiar restraints upon the exercise of police power by either the state or Federal government."

Cooley, in his work on Constitutional Limitations, page 10, says:

> "The government of the United States is one of enumerated powers; the national constitution being the instrument which specifies them and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the constitutions of the several states which are not grants of powers to the states, but which apportion and impose restrictions upon the powers which the states inherently possess."

The police powers are not easy to define, but this Court, in Munn vs. Illinois, 94 U. S. 113, have given this definition (page 145).

> "The power of the state over the property of the citizen under the constitutional guaranty is well defined. The state may take his property for pub lic uses, upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of

the rights of others, and to secure them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor—*sic utere tuo ut alienum non laedas*—is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of state authority. *Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits.*"

In his commentaries, after speaking of the protection afforded by the constitution to private property, Chancellor Kent says:

"But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, *so far as may be necessary to prevent the abuse of the right to the injury or annoyance of others, or of the public.* The government may, by gerenal regulations, interdict such uses of property as would create nuisances and become dangerous to the lives or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, *on the general and rational principle that every person ought to so use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.*"

Potter's Dwarris Statutes, 444, and Prentice on Police Power, page 1, denominate police power as "*the Law of Overruling Necessity.*" From all which one must indeed have a very vivid imagination if he can place within the category mentioned a registration act. It can not be said that the enactment of a registration law is required because of any "*overruling necessity.*" Neither is it required for the protection of the lives, limbs, health, peace, comfort or quiet of a people, nor to prevent nuisances.

Yet, if a registration statute is held to fall within the category named, still this does not help the matter, because in its exercise of the police power congress can not discriminate against non-residents or otherwise overstep the boundary by which it is hedged in by the constitution. The constitution is as much a bar against congress making police regulations which discriminate in favor of the citizens of one state or territory as it is against its making any other discriminating law.

Neither does it make any difference by what name such a statute is styled. "A rose by any other name would smell as sweet." A court will look behind the title, and if the law in any manner, directly or indirectly, discriminates against any citizen of the United States, or his property, or in any other manner, directly or indirectly, discriminates against any citizen of the United States, or his property, or in any other manner conflicts with or violates the constitution, it will hold the law to be void.

III.

In regard to the law of February 3, 1897.

Plaintiffs lay great stress upon the fact that the judgment in the attachment suit was rendered before

this statute was enacted. We think we have met this proposition in what we have said heretofore, but desire to call the court's attention to some authorities which meet their other contention, viz.: that no law will be held to be retroactive which by so holding would disturb vested rights

In Watson v. Mercer, 8 Pet. 88, this court through Judge Story, said:

> "As to the first point, it is clear that this court had no right to pronounce an act of the State legislature void, as contrary to the Constitution of the United States from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the state from passing retrospective laws generally, but only *ex post facto* laws.
>
> * * * * *
>
> In the next place, does the act of 1826 violate the obligations of any contract? In our judgment, it certainly does not, either in its terms or in its principles. It does not even affect to touch any title acquired by a patent or any other grant. It supposes the title of the *femes covert* to be good, however acquired; and only provides that deeds of conveyance made by them, shall not be void, because there is a defective acknowledgment of the deeds by which they have sought to transfer their title. So far, then, as it has any legal operation, it goes to confirm and not to impair, the contract of the *femes covert*. It gives the very effect of their acts and contracts which they intended to give; and which, from mistake or accident, has not been affected."

In Satterlee vs. Matthewson, 2 Pet., 380, the court said:

> "If the effect of the statute in question be not to impair the obligation of either of those contracts,

and none other appear upon this record, is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so, but retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument. * * *

"The objection, however, which was most pressed upon the court, and relied upon by the counsel of the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this or of any circuit court which has condemned such law upon this ground, provided its effect be not to impair the obligation of the contract; and it has been shown that the act in question had no such effect upon either of the contracts which have been before mentioned."

In Ewell vs. Daggs, 108 U. S., the court at pages 150-1, says:

"The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws without a saving clause operated retrospectively, so as to cut off the defense for the future even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld as against all objections, on the ground that they deprived parties of vested rights, or impaired the obligations of contracts. The very point was so decided in the fol-

lowing cases: Curtis vs. Leavitt, 15 N. Y. 9; Savings Bank vs. Allen, 28 Conn. 97; Welch vs. Wadsworth, 30 Conn. 149; Andrews vs. Russell, 7 Blackf. 474; Wood vs. Kennedy, 19 Ind. 68; Town of Danville vs. Pace, 25 Grat. 1; Parmlee vs. Lawrence, 18 Ill.; Woodruff vs. Scruggs, 27 Ark. 26.

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of defendant to avoid his contract is given to him by statute, for purposes of his own, and not because it effects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in *fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy and forms no element in the rights that inhere in the contract. The benefit which was received as the consideration of the contract, which, contrary to law, he actually made is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read vs. Plattsmouth, 107 U. S., 5568; and see Lewis vs. McElvain, 16 Ohio, 347; Johnson vs. Bentley, Ib. 97; Trustees vs. McCaugh, 2 Ohio Stat. 152; Satterlee vs. Matthewson, 16 S. & R. 169; S. C. in error; 5 Pet. 380; Watson vs. Mercerm, 8 Pet. 88."

The opinion of Justice Miller in Steamship Company, vs. Joliffe, 2 Wall. 450; so ably presents this question, that we quote therefrom. He said:

"The cases of Yeaton vs. United States, 5 Cranch, 281, and Schooner Rachel, 6 Id. 329, in this court, decide *that on appeal from an admiralty decree that decree will be reversed, because the law under*

which the vessel became forfeited had expired by its own limitation pending the appeal, although the vessel had been sold and the money paid in the treasury of the United States before the statue expired.

"Unquestionably, the appellate tribunal is bound to take judicial notice of the repealing statute. If so, I fail to see how it can affirm a judgment which, by the law in existence at the time of such affirmance, has become erroneous, though not so when rendered. And so are the authorities without exception, so far as I am aware.

"But it is said that plaintiff, by his judgment in the court below, acquired a vested right to the sum of money for which he recovered that judgment, which could not be taken away by repeal of the act.

"I deny that a party suing another for a statute penalty can acquire a vested right in the sum which the law allows in such cases, until he has actually received the money into his own possession. Such is evidently the principle deducible from the cases of Yeaton vs. United States, above referred to. Such is also the express decision of this court in the case of Norris vs. Crocker, 13 Howard, 29, except that in that case the repeal took place while the suit was pending and before judgment. This court held in the language of Judge Catron, that, 'as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law.'"

A judgment is only one of the steps in the progress of a suit by which the plaintiff, if successful, obtains what he is seeking. It only declares the right of the party, but does not create it. It may be set aside or reversed, and gives the plaintiff no right superior to that which he had before he obtained it.

If the claim on which he proceeded was a vested right, it remains so after judgment; not because of the judgment, but because it existed before, and the judg-

ment only ascertains that fact, and enables him to enforce it. If the judgment was founded on a statute right, it still only declares that on the facts as the law then stood, the plaintiff was entitled to recover, but that right is no more sacred or no more protected from legislative action than before. If there is such a thing as a vested right in a statutes penality, it must become vested either when the facts occur which give the right, or when the plaintiff makes his claim to the benefit of the statute by commencing an action for the sum which the law allows. That no such right accrues from either of those circumstances the cases which I have last cited seem conclusive.

Cooley Constitutional Limitations, says on page 465 (6th Edition):

> "These laws must be confined to the parties to the original contract, and to such as have succeded to their rights with no greater equities. A subsequent *bona fide* purchaser can not be deprived of the property."

On pages 468 and 469 he says it makes no difference that the act was passed after suit is brought.

> "The bringing suit vests in the party no right to a particular decision, and his case must be determined on the law as it stands, not when it was brought, but when the judgment was rendered."

Drake on Attachments, sec. 228, says:

> "As the whole office of an attachment is to seize and hold the property until it can be subjected to execution, its lien is barren of any beneficial results to the plaintiff unless he obtains judgment against the defendant and proceeds to subject the property to execution."

Attachment is part of the remedy given by statute for the collection of a debt. There is no such thing as

vested right in a remedy. The remedy may be changed at the will of the legislature, provided a substantial remedy is left or provided. In section 480, Sutherland on Statutory Constructions, says:

> "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights."

What is a vested right? The same author in section 164 defines it as follows:

> "When a right has arisen on a contract or a transaction in the nature of a contract authorized by statute has been so far perfected that nothing remains to be done by the party asserting such rights, the repeal of the statute will not affect it, or an action for its enforcement. It has become a vested right which stands independently of the statutes."

Citing Pacific Mail, SS. Co. vs. Jolliffee, 2 Wall, 450. In the same section Sutherland says:

> "A law can be repealed by the law-giver, but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. If, before rights become vested in particular individuals, the convenience of the state induces amendment or appeal of the laws, those individuals have no cause to complain."

In Section 163, Sutherland on Stat. says:

> "Rights depending upon a statute (and the right to an attachment is such a one, there being no such thing at common law) and still inchoate, not

perfected by final judgment or reduced to possession are lost by repeal or expiration of the statute."

This rule applies to mechanics' liens given by statutes where the requisite proceedings to fix the lien have not been completed at the date of the repeal. After levy of an attachment, statute may destroy the lien by repeal of attachment law, which could not be done if it were vested right. Drake on Attachments (6 Ed.), sec. 224, and note and sec. 412. Liens given to landlords may be abolished by a repeal of the statute giving the lien. Stocking vs. Hunt, 3 Denio. Imprisonment for debt may be abolished and prisoner discharged. Sedgwick on Statute 645, citing Sturgiss vs. Crowningshield, 4 Wheat, also Story on the Constitutional 1398.

In Johnson vs. Richardson, 44 Ark. 365, the court held that retroactive laws were not unconsitutional; that a suit does not entitle a party to a special remedy or decision, but the case must be determined by the law in force when decided.

The case was this: A woman who had made a defective acknowledgment of a deed conveying realty, had brought suit for dower; the legislature enacted a law declaring that all such acknowledgments shall be held good. The woman contended that this act was inoperative to her because,

First. It was passed after her suit was brought.

Second. To give it effect would deprive her of a vested right.

The Supreme Court reversed the court below, which had been in favor of the woman, and held as above.

Chanscellor Kent says: "An estate is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment."

4 Kent's Com. 202.

Van Syckle, J., in Moore v. State 43 N. J. L. 243, says: "Very loose notions are entertained in respect to vested rights. * * * What are vested rights? In the widest sense they are rights which are complete and consummate so that nothing remains to be done to fix the right of the citizen to enjoy them."

In Calder v. Bull, 3d Dall. 386, this court per Chase, J., defines a vested right thus: "A right of property is a perfect and exclusive right, but before he has acquired a better right to the property than any other person in the world. The right only to recover property, is not a perfect and exclusive right."

In Borman v. Schafer, 18 Wis. 437, the court held that the right of a judgment creditor to file a transcript of his judgment, and thus take necessary additional step to perfect his lien, was not a vested right and might be taken away by the legislature.

In Randell v. Kreiger, 23 Wall. 148, this court held a retroactive law validating a married woman's deed not violative of the constitution.

In Thompson v. Lee Co., 3d Wall, 331, this court said, "If a legislature possessed the power to authorize an act to be done, it could by a retrospective act cure the evils which existed, because the power thus conferred had been irregularly executed. The question with the legislature was one of policy and the determination made by it is conclusive.

In Curry v. Landers, 35 Ala. 280, the court held an act of the legislature destroying the lien of a judgment valid, saying: "We regard the exercise of such a power by the legislature as effecting the remedy only, and not impairing the obligation of the contract."

In U. S. Savings & Loan Co. v. Miller, 47 S. W. Rep. 17, the Supreme Court of Tennessee held valid an act of

the legislature making good the mortgage of a foreign corporation which was invalid because of its failure to comply with the pre-existing law, thereby cutting out the lien of a subsequent judgment creditor although his execution was levied on the mortgaged property.

In Curtis v. Whitney, 13 Wall. 68, this court held that a statute does not necessarily impair the obligation of a contract, because it may effect it retrospectively, or because it enhances the difficulty of performance to one party or diminishes the value of the performance to the other, provided it leaves the obligation of performance in full force.

In Trustees v. Rider, 13 Conn. 87, the Supreme Court of Connecticut held that a statute granting money to a private corporation or individual, to be acquired in future, and through the official action of public agents, may be repealed at any time before the acquisition and application of the money, and the grant defeated before it is fully executed. Such a grant is not a perfect obligation capable of enforcement.

In Bradon v. Green, 7 Humphrey, 130; a Tennessee case, the Supreme Court of Tennessee decided that a statute giving a new remedy to defeat usurious contracts is constitutional, even as to existing contracts and judgments upon them. See Wilson v. Hardesby, 1 Maryland Chauncery, 66.

In the Covington Railroad v. Kenton, 12 B. Munroe, 147, 148, the Court of Appeals of Kentucky say that provisions in a railroad charter, providing for county subscription to stock and the collection of a tax to pay the same, are no contract between the State and the railroad company, and may be repealed at any time before they are complete by full execution. The legislature may take away by statute what by statute is

granted, unless by execution of the powers granted, private rights, in some definite thing or property, have become vested.

A legislative act, this court held in Railroad Co. v. Nesbit, 10 Howard, 400, 401, cannot impair the obligation of a contract, unless at the time of its passage, some one not subject to legislative control, "by contract with the State, has been vested with certain, perfect, absolute rights of property," which rights are divested or impaired by such act.

It is also held in Beers v. Bingham, 9 Peters, 359, that "the right to imprison (for debt) constitutes no part of the contract; and discharge of the person of the party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects;" and, in Mason vs. Hake, 12 Wheaton, 370, where A gave a prison-limits bond, and by an act of the legislature was discharged from arrest and imprisonment, that the act was valid.

In Oriental Bank v. Frieze, 18 Maine, 109, the Supreme Court of Maine says:

> "When a person by existing laws becomes entitled to a judgment or to have certain real or personal property applied to the satisfaction of his debt, he is apt to regard the privilege as a vested right, not considering that it has its foundations only in the remedy, which may be changed, and the right thereby destroyed."

It was accordingly held that the legislature may take away rights given by statute, until those rights are perfect, and vested by judgment recovered.

In the Sunbury Railroad Co. vs. Cooper, 33 Penn. State, 278, 281, 285, the Supreme Court of Pennsylvania lay down principles which justify fully the action of the court below in its refusal to grant a mandamus.

The legislature of Pennsylvania had there pledged the revenues of the State canals to the payment of certain State bonds. Afterwards an act was passed for the sale of these canals, and different appropriation of the proceeds. The diversion of the pledge made by the legislature was held to be without legal redress.

Numerous cases are cited in effect similar with the principle above generally asserted by us. See Mayor vs. The State, 15 Md. 376; Trustees v. Tatman, 13 Ill. 28; Stocking v. Hunt, 3 Denio, 274; Fisher v. Lackey, 6 Blackford, 373; Evans v. Montgomery, 4 Watts & Sergeant, 220; Springfield v. Commissioners, 5 Pickering, 508.

Story on the Constitution, 6th Edition, par. 1957, says:

> "There are some other cases in which the intervention of the legislature to affect the rights of parties has been sustained that may at first view appear more questionable than those just referred to. But where the principle that underlies them is seen and understood, there is no difficulty in accepting them as sound and the principle itself as safe. The limitation upon such intervention is that vested rights are not to be distributed; but, as has been well remarked, *courts do not regard rights as vested, contrary to the equity and justice of the case. A party has no vested right in a rule of law which would give him an equitable advantage over another; and such rule may therefore be repealed and the advantage thereby taken away.*"

3 Parsons on Contracts, at page 552, says:

> "*It is to be observed, that, as to the remedy, there can be no difference between a debt existing before and one contracted after the law is made. There may be a difference as to the propriety or expediency of the law, but none as to the right of the State to pass the law; for this right is perfect, ex-*

cept so far as it is controlled by this clause in the constitution. And on this ground, it has been held that nothing in the constitution of the United States prevented a State from passing a valid law to divest rights which had been vested by law in an individual, because this was not a contract. And it has been decided in Connecticut that a State law making valid a void contract does not impair the obligation of a contract within the intent of the constitution of the United States."

I will call the attention of the court to another case, that seems to me as it did to the court below, conclusive of this cause. That is the case of Green vs. Abraham, 43 Ark. 420.

The facts of the case were these: One McReynolds had made a chattel deed of trust on his crop of corn to Green, the plaintiff, but the acknowledgment having been taken by the trustee in the deed of trust, was invalid; after this instrument had been recorded a creditor of McReynolds got judgment against him and on an execution under that judgment Abraham, a constable, and defendant in the action, had levied upon and seized the mortgaged corn. At this period the legislature of the state enacted a healing act (March, 1888), making all such acknowledgments theretofore taken valid. Whereupon Green, the mortgagee, brought this action for the possession of the corn. The Supreme Court of Arkansas, in its opinion, said:

> "But the healing acts are not permitted to interfere with or disturb vested rights. A purchaser from McReynolds of this crop, between the recording of the trust deed and the passage of the law could not be deprived of his property by an act which retrospectively deprived McReynolds of the title he had when the purchase was made. But the constable, levying his execution upon the corn as the property of McReynolds, is not a purchaser.

> He has, indeed, succeeded to the rights of McReynolds, so far as this action is concerned, but his equities are not greater than those of McReynolds, and neither he nor McReynolds can have a vested right to a defense based upon an informality which does not effect his substantial equities."

The court held that the law of March, 1883, was a retrospective law, and that the mortgage was made just as effectual by reason of that law as it would have been had it been properly acknowledged and recorded at the time it was acknowledged and recorded, *and that the creditor got no vested right in the property seized by virtue of his execution till it was sold thereunder, and the purchase price actually paid therefor.* That is a leading case, but it had been preceded in Arkansas by several other cases of the same purport.

In 1843 the legislature enacted a law which was retrospective and curative in purport, very similar to the law under discussion, and in Elliott vs. Pierce, 20 Ark. 508, the court held that the law validated the deed.

And in Woodruff vs. Scruggs, 27 Ark. 26, the court held that a note made in 1866, which was usurious, and hence void under the law, as it then stood, was made valid upon the repeal of the usury law; which repealing act declared that "no plea of usury nor defense founded upon any allegation of usury shall be sustained in any court in this state."

In that case the court held that this law was retrospective, saying that "all general rules on construction must yield to the clear intention of the legislature, sufficiently expressed. In this instance the intention is clear and fully expressed when it declares 'no plea of usury nor defense founded upon any allegation of usury shall be sustained in any court in this state.'

It makes no reservations or exceptions, but is emphatic, commanding the court not to sustain any such plea." The court further says:

> "While this statute and the repeal of all previous usury laws may affect injuriously the antecedent legal rights of the borrower, the appellant in this case, under the contract, still the law is binding, although the debtor may have 'antecedent rights of the nature of vested rights.'"

In Vaughan vs. Bowie, 30 Ark. 283, the court said:

> "A repealed statute must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and *concluded* whilst it was an existing law."

Following Green v. Abraham the court, in Reid vs. Hart, 45 Ark. 41, again construed the Act of March, 1883, and held that the act related to pending suits, and made a deed of the same force as if it had been properly acknowledged at first, unless rights had meanwhile become vested "in other *innocent* parties." That is the language of the court. The court further said:

> "The curing act placed the deed of the guardian upon the footing that it would have occupied as evidence" had it been properly acknowledged.

They say further:

> "Laws regulating evidence may embrace past transactions. One can not have a vested right in a rule of evidence."

The case of Green vs. Abraham, has never been overruled, or its doctrine doubted until the brief of my learned opponent, but on the contrary, it has been repeatedly referred to as enunciating correctly the law and has been repeatedly affirmed.

In Johnson vs. Richardson, 44 Ark. 365, the court reaffirmed the doctrine of Green vs. Abraham, and also cited and approved the doctrine of Mercer vs. Watson, 1 Watts. 330, S. C., 8 Peters, 88. This case supports the doctrine which we have endeavored to enunciate, to wit: that until an attachment has not only ripened into a judgment and the judgment into an execution, but further, until the property has been sold under the execution and the money paid over to the sheriff, the legislature may enact laws withdrawing the property from the lien of attachment.

Again, in Appell vs. Kelsey, 47 Ark. 413; Beard vs. Dansby, 48 Ark. 187, and State *ex rel.* vs. Hicks, 48 Ark. 519, the court refers to and approves Green vs. Abraham.

In Cupp vs. Welch, 50 Ark. 294, the court cites and approves Green vs. Abraham, and holds that the law making power may enact retrospective laws so as to affect, if not divest, vested rights.

Again, in Sidway vs. Lawson, 58 Ark. 117, the court refers to and approves Green vs. Abraham. In this decision the court three times mentions that case and affirms all the doctrines enunciated therein.

The conclusion which I reach is that my learned opponent looks obliquely upon this case, but it seems to be very well considered by the Supreme Court of Arkansas.

Six times has it been affirmed and quoted from approvingly, and I don't know how many more.

Now, if that decision is the law of the land, then is the act of February 3 what we maintain it is, to wit: a retrospective act and one which prevents the plaintiff from acquiring any interests in the mortgaged property, unless he succeeds in attaching, getting a

judgment, an execution, a sale and the purchase price in his hands, before the interpleader steps in.

The Supreme Court of Arkansas has again very recently rendered a decision which seems to be likewise conclusive on this point, especially as it is a construction of retroactive laws made by the court of last resort in the State of Arkansas.

The case of Steers vs. Kinsey, decided by the Supreme Court of Arkansas, on the 20th of October, 1900, and reported in the 58 S. W. Rep., page 1050, was an action brought to quiet title of certain real estate. The facts were substantially these:

A corporation in Arkansas, in October, 1889, made a mortgage with power of sale on its real estate, which mortgage was so improperly acknowledged as to render the acknowledgment invalid under the Arkansas law. The indebtedness which the mortgage was given to secure maturing, and not being paid, the mortgagee sold the land by virtue of the power given him therein. This was in September, 1891. On the 10th day of December, 1890, the plaintiff, Steers, brought an action in attachment against the mortgagor and levied upon the land in controversy, and on March 29, 1892, he recovered a judgment against the land and the mortgagor, and the attachment was sustained. Under that judgment, the lands were sold on the 14th of May, 1892, and purchased by the plaintiff in this action. The controversy in the suit was between the purchaser under the mortgage, and the purchaser under the execution in the attachment suit. On the 11th day of March, 1891, and subsequent to the execution of the mortgage, and also subsequent to the commencement of the attachment suit, but prior to the sale of the land under the mort-

gage, the legislature of Arkansas enacted a law, which declared, in effect, that conveyances of land heretofore recorded in which the acknowledgment was invalid, should be as valid as though the acknowledgment was in due form. The question at issue was as to whether the attachment creditor obtained a vested right, by virtue of his attachment as against the mortgage.

The Supreme Court, in passing upon this question, said:

> "If the statute made the mortgage valid as to the attaching creditors the rights of those holding under the mortgage could not be affected by the present suit. The statute cured defects in the acknowledgment to the mortgage and give it, except as to persons having acquired vested rights in the land before the passage of the acts, the same force and effect it would have had had it been properly acknowledged in the first instance. The only question that remains then is, whether the parties who brought the attachment suits acquired vested rights in the land by the bringing of the suit and the levy upon the lands. Now, a vested right must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, to the present or future enjoyment of property in some way or another. Black's St. Const., 430; Sutherland's St. Const. Par. 164. But parties have no vested rights in remedies or matters of proceedure, and we see nothing in these attachment proceedings that constituted a vested right on the part of the plaintiff therein to the property attached. The attachments were levied upon the land after the mortgage under which the Arkansas City Improvement Co. (the purchaser under the mortgage sale) holds, had been executed and recorded, and we think that it was within the power of the legislature to give to such mortgage

the effect intended by the parties thereto by curing the formal defect in the acknowledgment. Rosenthal v. Wehe, 58 Wis. 621; 6 Am. & Eng. En. of Law, 2nd Ed. 947; Stephenson v. Doe. 8 Blackf. 508; Butler v. Palmer, 1 Hill, 324.

We are therefore of the opinion that the mortgage under which the Improvement Co. claims the land was, after the passage of the act of 1891, superior to the liens acquired by the attachments. The attachments were subject to the mortgage and the title acquired by the Improvement Co. under the mortgage laws of the land conveyed by the mortgage is superior to that acquired by those who purchased these same lands at the sale ordered to satisfy the judgments obtained in the attachment suits."

Our opponents try to distinguish Green v. Abraham from the case at bar in that here plaintiffs claim vested rights growing out of the lien of their attachment, while there the constable levied on the property by virtue of an execution and that such a levy did not vest a right while an attachment levy did. Now comes the Steers case where the Supreme Court of Arkansas says the levy of a writ of attachment on property gives no vested right therein; thus effectually answering plaintiff's contention.

To my mind these two cases: Green-Abraham and Steeres, conclusively deny plaintiff's rights so far as the Supreme Court of Arkansas can do so.

Again, this interplea presented an entirely different issue from those in the case of McFadden vs. Blocker. The only issues between them were the ground of attachment (non-residence) and the indebtedness of Blocker to them. There was no issue as to the ownership of the property. Blocker would not be heard to deny that he was the owner—and in the absence of a

claim to it by a third party, it would have been treated as Blocker's property.

But the interplea presents an issue of ownership in interpleader. This makes a separate suit, has to be tried separately, and is between the plaintiff and the interpleader without regard to Blocker.

In Sannoner vs. Jacobson & Co., 47 Ark., pp. 40, 41, 42, Judge Cockrell, delivering the opinion of the court, says:

> "One who claims title to attached property is permitted to intervene in the first attachment suit and then contest his rights with the plaintiff in that proceeding. * * * The intervening suit is a separate and distinct one, however, and the issues are made between the plaintiff in the attachment suit and the intervener without regard to the common defendant. * * *
>
> "It can not with propriety, be contended that the intervener is let in for the purpose of defending the suit and disputing the grounds of attachment in lieu of the defendant. The intervener is treated as a stranger to the attachment proceedings," and

Shinn on Attachment, sec. 440, says:

> "The judgment records of the proceedings of intervention should be kept distinct from the records of the proceedings in the attachment suit."

In Section 429, Shinn says:

> "An intervener can not defend in the attachment suit in lieu of the defendant. The only fact that is permitted to be put in issue in the absence of fraud is the claimant's right and title to the attached property. Intervention is an interlocutory proceeding, and the only consequences of a judgment in intervention is the conclusion that the thing in dispute is or is not the property of the claimant."

There is no issue of fraud in this case. On the other hand it is distinctly admitted that there was no fraud. The interpleader was no party to the suit between McFadden and Blocker, and it had no right to defend or be heard against the order sustaining the attachment or against the judgment against Blocker. That being so, nothing that was done in the suit between McFadden and Blocker, after the filing of the interplea, can in any way whatever affect the interest of interpleader.

Black on Judgments, section 226, says:

> "It has been declared by the Supreme Court of the United States that a sentence in a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his right, and is not entitled to respect in any other tribunal."

This is a principle too elementary to require a citation of authorities, and we cite but one. Huiscamp vs. Moline Wagon Company, 121 U. S. Rep. ~~971 (1 Ed.)~~ 319 was a suit by Moline Wagon Company vs. Rummell and Culter. An attachment was sued out on the ground that defendants had fraudulently conveyed or assigned their property, etc. It was levied on property in possession of Huiscamp, who claimed it. There was a judgment against defendants, and the ground of attachment was controverted and judgment rendered sustaining the attachment; Cutler, one of the defendants, not appearing and thereby confessing the charge of fraud. On the trial of the interplea plaintiffs offered in evidence the proceedings had on trial of the plea in abatement, which were admitted over interpleader's objections. Judge Blatchford, delivering the opinion, says:

> "Such proof could not be made as against the interpleaders in view of what the evidence which they offered tended to show by proving that the issue as to the intent of Rummell had been tried and found against him in the trial on his plea in abatement. That was an issue to which the interpleaders were not parties, and the record of its trial was wholly inadmissible as against the interpleaders. The interpleaders were not parties to the proceedings, did not control them and can not be affected by them."

Then, when the attachment was levied in this case, the lien acquired was inchoate, imperfect, contingent, so it was when the interplea was filed, and so it was after the judgment settling the issues between McFadden and Blocker. A contingent lien on the chattel could not by an adjudication of the issues between McFadden and Blocker be made a fixed and perfected lien on them—for interpleader was not and could not defend or be heard against the rendering of the judgment, which appellant claims perfected the lien on the cattle claimed by interpleader. It would be a radical departure if a lien could be fixed and perfected on property while the party owing it or claiming it had not been heard or had his day in court.

The judgment against Blocker does not purport to foreclose the lien, but counsel for plaintiffs says that is not necessary. Waples on Attachment, sec. 506, says:

> "Judgment for plaintiff after issue joined is complete as a personal one—such judgment, however, in attachment suits is usually attended by the addition: 'with privilege on property attached.'"

This or equivalent words, is the judcial recognition of the attachment lien— a perfection of the previously

incipient right; an elimination of the hypothetical feature of the *jus ad rem*. It is a judgment against the property; a judicial finding that it is an indebted thing and a virtual condemnation of it to pay its owner's debt. Now this is where the parties are only plaintiff and defendant. The author then proceeds:

> "Whether such a decree *in rem* is made by the insertion of the clause above quoted or its equivalent, or is made by implication only in the personal judgment the effect is the same."

That is, it is a judicial finding, it is an indebted thing, a virtual condemnation of the property.

How could the judgment against Blocker by a judicial condemnation of the cattle claimed by the interpleader, when it was no party to the proceeding? But the judgment against Blocker does not purport to condemn the property, but recognizes the fact that it can not do so. After sustaining the attachment and rendering judgment against Blocker, the judgment proceeds as follows:

> "And it appearing to the court that Evans-Snider-Buel Co. have interpleaded in this cause, claiming the property levied on under the writ of attachment sued out by plaintiff and levied upon as the property of J. R. Blocker, and that said interplea is yet undisposed of and waiting trial thereon."

Then follows that plaintiff had applied for a change of venue to Tahlquah which was granted, and it concludes as follows:

> "And plaintiffs are given to the first day of the next term of court to be held at Tahlequah to plead, answer or demur to said interplea."

These recitals most clearly show that this is an interlocutory judgment, and that something remained to

be done before the cattle should be disposed of. Now there is in that judgment neither recital nor implication that the cattle are condemned or the lien perfected on them.

But if plaintiffs' contention is correct, why try the interplea at all—if it was settled that the cattle were condemned to the payment of the judgment against Blocker without interpleader having anything to say about it, then interpleader would cease to have any interest in the trial of his interplea, as the cattle had already been appropriated, regardless of its claim, and the trial of the interplea would be a mere matter of form, or worse, a mockery, simply to settle an issue that no one had the slightest interest in. If the lien is fixed and perfected by the judgment, how is it that the cattle have not been sold under an execution or order of sale? When plaintiff and defendant are the only parties, an order sustaining the attachment, and a judgment against the defendant perfects the lien, and an order of sale follows.

In the case at bar there was an order sustaining the attachment as a judgment against Blocker, and if that perfected the lien on the cattle, that is all the plaintiff asked and there is nothing to hinder the court making an order directing the sale of the attached property. But plaintiffs' counsel say:

> "An order of sale was neither necessary nor proper, for the property had been taken under section 390 of Mansfield's Digest—an order could not be made until the trial of the interplea when all proper orders should and would be made under section 351 and 391."

They say that no order of sale was necessary under these sections or under the general attachment law. We contend that an order of sale (which a judgment

properly drawn always contains) is necessary under both. Section 347 Mansfield's Digest, of the general attachment law, says:

> "If the moneys from the sale of perishable property and proceeds of garnishment are not sufficient, the court shall order a sale of any other attached property."

Section 391, says:

> "If the property is found to be the property of the defendant, the claimant shall deliver it to the sheriff, whenever demanded, after execution shall come to his hands to be levied thereon."

This does not say after execution against defendant's property generally shall come to his hands, but after one comes to his hands ordering him to levy on the property claimed in the interplea and which had been found to be the property of the defendant, and of course, such an execution would have to issue from a judgment condemning the property attached to be sold. So it seems that the property attached does not become liable to be appropriated for the payment of the judgment against Blocker until on the trial of the interplea it is found to be the property of Blocker and not of interpleaders. This difference between plaintiff's counsel and ourselves is set at rest by Judge Mansfield, the compiler of Mansfield's Digest, and afterwards a judge of the Supreme Court of Arkansas, who, in a note to section 391, says: "For form of judgment, etc., on trial of interplea under this act, see Adams et al. vs. Hobbs, 27 Ark., which says:

> "In the case before us we find that the court first tried the original suit, rendered judgment by default against Zane and ordered execution against the cotton attached, in the event that the interpleas should be determined in favor of the plaintiff.

> The court then tried and determined the interplea, finding that the cotton levied on was subject to the attachment, and rendering the following judgment: 'It is therefore considered that the plaintiffs have execution against said cotton and if the same is not delivered to the sheriff of Pulaski county by said interpleader on demand, that execution issue against the sureties on interpleader's bond,' etc."

The court further said that said judgment followed the language of the act, which was the same as section 390-1 of Mansfield's Digest, with almost unnecesary particularity. The court proceeds as follows:

> "The act requires that executions shall issue upon the judgment in the original suit against the defendants in this case, *in rem* against the cotton alone."

In Arkansas the correct practice is to settle all issues between plaintiff and defendant before trying the interplea. (Sanger vs. Flow, 1 U. S. C. C. A. 56; Waples and Platter vs. Low, 4 U. S. C. C. A. 207.)

Plaintiffs claim vested rights by virtue of the judgment against Blocker, which they contend is a final judgment, fixing their lien on the attached cattle.

Black on Judgments, section 23, says:

> "As a general rule a judgment must possess the character of finality in disposing of the rights of all the parties concerned before it can be considered final with reference to any of them."

In section 24 the author says:

> "It is always requisite that a judgment, in order to be final, should determine all the issues involved in the cause."

Interpleader was a party to one branch of the case, and claimed some rights, and every order and judg-

ment that was had in the case prior to the trial of the interplea was interlocutory as to the interpleader and its rights, and the contingent attachment lien would not be perfected upon the property claimed by interpleader until it had its day in court.

Plaintiffs claim vested rights by virtue of their judgment. They had no vested right in the lien, for that was but a remedy, and there can be no vested right in a remedy. They had no vested right in or to the attached cattle, for the title to the cattle, which had been put in issue by the interplea, had not been adjudicated, consequently their right to the cattle was contingent.

Anderson's Law Dictionary, under the head of vested rights, says:

> "In the widest sense vested rights are rights which are complete and consummated, so that nothing remains to be done to fix the right of the citizen to enjoy them."

After the judgment against Blocker there remained an undisposed of interplea and the right to enjoy the attached cattle.

All the cases cited in plaintiffs' brief on the subject of vested rights are where there was an attachment, a judgment and an execution levied. Not one where the right was vested by levy of the attachment except Conrad vs. Smith, *supra*. They claim that their levy entitles them to the same protection as if they were bona fide purchasers for value and without notice. Without noticing the authorities relied on, it is sufficient to say that they are not, for the reason that if they were, subsequent legislation could not affect them, while all the authorities agree that the legislature may repeal the attachment law and thus dissolve the attachment.

Plaintiffs did not acquire any property in the cattle by their levy. Shin on Attachment, section 313, says:

> "The attaching creditor acquires no property, either general nor special, in either realty or personality by his attachment. The title remains in the debtor until the attachment lien is merged into a judgment condemning the property, and a sale is made thereof."
>
> "In Atkins vs. Swope, 36 Ark. 537, Judge Eakin, delivering the opinion, says: 'It (the attachment) brings under the control of the court, not of the plaintiff, property to be held for the purpose. The plaintiff has no right to it in any sense as property.' In Tenant vs. Watson, 58 Ark., page 255, it is said: 'It (the attachment) creates no estate in the property. It is neither *jus ad rem* nor *jus in re*.' Then appellants had no property in the cattle to be deprived of. Their lien was inchoate, imperfect, contingent. Their judgment against Blocker did not perfect the lien on the cattle, interpleader being no party to that transaction. Appellants' rights consist in being permitted under the law, as it then stood, to take advantage of a defective record and take property which interpleader's money paid for, and for which they paid nothing, and appropriate it to the payment of an old indebtedness of Blocker to them. The defective record (which has been cured) was the only basis of appellants' claim to take these cattle on their judgment against Blocker. And in the langnage of Mr. Sutherland, section 484, "Rights resting upon such curable defects alone can not be deemed meritorious and are not entitled to the protection accorded vested rights."

Therefore, we say that these mortgages were properly received by the court. All these decisions except Steers v. Kinsey were in the reports long before the passage of the third of February law, and hence, the

court must presume that when that law was enacted congress had these decisions in view. In addition to the arguments on this point here presented, I desire to call the court's attention to the opinion of the U. S. Cir. Ct. of Appeals in this case, and for the convenience of this court I have printed it and attach it hereto.

Wherefore we pray this court to affirm the judgment of the United States Circuit Court of Appeals.

Respectfully submitted,

H. M. POLLARD,

Of counsel for Defendants in Error.

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 1403.—MAY TERM, A. D. 1900.

Evans-Snider-Buel Company et al., Plaintiffs in Error, vs. William McFadden et al., Defendants in Error.	In Error to the United States Court of Appeals in the Indian Territory.

Mr. U. M. Rose and Mr. H. M. Pollard (Mr. C. B. Stuart, Mr. W. E. Hemingway and Mr. G. B. Rose were with them on the brief) for the plaintiffs in error.

Mr. W. T. Hutchings and Mr. N. B. Maxey (Mr. J. B. Clayton was with them on the brief) for the defendants in error.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

The record in this case discloses the following facts, in the light of which it is to be determined: On June 17, 1896, the Evans-Snider-Buel Company, the principal plaintiff in error, held two deeds of trust in the nature of mortgages, one dated April 23, 1896, and the other May 19, 1896, covering about six thousand seven hundred and seventy-five head of cattle, which deeds of trust had been executed by John R. Blocker, who was at the time a resident and citizen of Bexar County, State of Texas. The cattle described and covered by the two deeds of trust were at the time in pasture near the town of Muskogee, in the Creek Nation of the Indian Territory. The deeds of trust were given to secure the payment of notes executed by John R. Blocker to the amount of about $130,000, which were held at the time by the Evans-Snider-Buel Company and rep-

resented money that had been advanced by that company to Blocker to enable him to purchase the cattle in controversy. The testimony shows without any contradiction that Blocker had not advanced any money of his own to purchase the cattle but that they had been acquired with funds furnished for that purpose by the Evans-Snider-Buel Company. Both deeds of trust were filed for record and were recorded, within a day or two after their execution, in the Clerk's office of the United States Court for the Northern District of the Indian Territory, that being the district in which the mortgaged property was located. One of the mortgages, being the one that was first executed to secure notes to the amount of $122,184.60, was also recorded the day after it was executed in Bexar County, Texas, where the mortgagor resided.

On June 17, 1896, William McFadden and Son, the defendants in error, commenced a suit by attachment against John R. Blocker in the United States Court for the Northern District of the Indian Territory upon a judgment in the sum of $55,875.71, which the attaching creditors had recovered against John R. Blocker in Jefferson County, Texas, on May 26, 1887. On June 29, 1896, they caused the writ of attachment in that suit to be levied on the cattle covered by the aforesaid deeds of trust, which were then in pasture near Muskogee in the Indian Territory. At the time of directing the levy of the writ of attachment McFadden and Son were aware of the existence of the two deeds of trust aforesaid, they having obtained a description of the cattle on which they directed the levy to be made by examining the description contained in said deeds of trust as then recorded in the Indian Territory.

On July 14, 1896, the Evans-Snider-Buel Company gave bond as interpleader in the cause, in the sum of $150,000, and having given such bond in accordance with law, was permitted to retain possession of the attached cattle. The writ issued in the attachment suit was returnable on the 3rd day of December, 1896, and at the return term of the writ, to wit: on January 27, 1897, the Evans-Snider-Buel Company filed its interplea in due form, asserting therein that the cattle were not subject to seizure and sale as the property of John R. Blocker but were its property. Two days later, to wit: January 29, 1897, judgment by default in the sum of $55,875.71 was rendered against J. R. Blocker in the attachment suit, he having failed to make answer to the complaint.

Subsequently the issue arising on the interplea in the case as between the Evans-Snider-Buel Company and William McFadden and Son was twice tried and resulted on each occasion in a verdict in

favor of the interpleader and against the attaching creditor, which judgments, however, were in each instance reversed on appeal by the United States Court of Appeals in the Indian Territory. The opinion of that court on the first appeal is reported in 48 S. W. Rep. 1043. On the last reversal the United States Court of Appeals in the Indian Territory rendered a judgment in favor of the attaching creditors and against the interpleader and the sureties on its bond in the sum of $72,250.35. The interpleader has brought the case to this court for review.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Among the numerous chapters of Mansfield's Digest of the Laws of Arkansas which were extended over and put in force in the Indian Territory by the act of Congress of May 2, 1890 (26 Stats. 81, 95, c. 182), was chapter 110, entitled "Mortgages," which chapter contains among others the following sections:

"Section 4742. All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides.

"Section 4743. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the Recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Prior to the adoption of the chapter concerning mortgages as the law of the Indian Territory, it had been decided by the Supreme Court of Arkansas in *Main* v. *Alexander*, 9 Ark. 112, that by force of the aforesaid sections a mortgage on personal property executed in that state was good as between the parties thereto, though not acknowledged and recorded, but that it constitutes no lien upon the mortgaged property as against strangers until it is acknowledged and recorded in the mode prescribed by the statute although they have actual notice of its existence. The doctrine last stated had been recognized and enforced in the State of Arkansas in several other cases prior to May 2, 1890, but in some cases, notably in *Martin* v. *Ogden*, 41 Ark. 186, 192, and in *Ford* v. *Burks*, 37 Ark. 91, 94, it had

been criticised as harsh and unjust and not in harmony with equitable principles as they prevail elsewhere. It had also been decided as early as 1886 in *Watson* v. *Thompson Lumber Co.*, 49 Ark. 83, that a foreign corporation, not being a resident of that State, could not execute a mortgage on personal property located in that State which it owned, and by placing it of record create a lien which would be good as against strangers. In *Main* v. *Alexander* the controversy arose between a mortgagee whose mortgage was recorded but not properly acknowledged and a creditor of the mortgagor who had attached the mortgaged property subsequent to the execution and record of the mortgage, and it was decided that the lien of the attaching creditor was paramount. In the case of *Watson* v. *Thompson Lumber Co.*, the controversy arose between a mortgagee who held a mortgage executed by a foreign corporation that was recorded in the county where the property was situated, and certain judgment creditors of the mortgagor company who had caused executions to be levied on the mortgaged property, subsequent to the execution and recording of the mortgage, and it was held that the lien of the judgment creditors was paramount to that of the mortgagee.

On February 3, 1897 (29 Stats. 510, c. 136), Congress passed an act to the following effect:

"That section forty-seven hundred and forty-two of Mansfield's Digest of the Laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: 'Provided, That if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated.'"

As this statute in express terms validated all mortgages theretofore made by non-residents of the Indian Territory on personal property there located which had been recorded in the judicial district where the property was situated, and therefore embraced and validated the two mortgages that had been executed by J. R. Blocker in favor of the Evans–Snider–Buel Company—one of the principal questions discussed before this court concerns the power of Congress to enact the statute aforesaid and give to it such retrospective operation. It will be observed that William McFadden and Son, hereafter referred to as the attaching creditors, caused the writ of attachment in the action brought by them against J. R. Blocker, the mortgagor, to be

levied on the cattle that were conveyed by the mortgage, about seven months before the act of Congress validating the mortgage was approved; also, that the judgment by default was entered in that case against the attached debtor five days before the law was enacted. But when the act was approved the interplea of the Evans–Snider–Buel Company in the attachment suit was still pending and undetermined as well as when the judgment by default was taken, and no trial of the issue existing between the interpleader and the attaching creditors was had until several months thereafter, to wit: on April 20, 1897.

We deem it wholly unnecessary to indulge in any extended discussion of the question which has been mooted, whether the act of Congress aforesaid impairs the obligation of a contract and is for that reason void, first, because the inhibition against the exercise of such power which is contained in section 10, Article 1, of the Federal Constitution is not addressed to the national legislature, but to the legislatures of the several states; *Mitchell* v. *Clark*, 110 U. S. 633, 643; Legal Tender Cases, 12 Wall. 457; Beach on Modern Law of Contracts, sec. 1633; and second, because no contract is disclosed by the record which the act of Congress in question operates to impair. It is true that the attaching creditors have a judgment against J. R. Blocker and that judgments are sometimes termed "contracts of record," but such general statements mean only that the law will imply a promise on the part of a judgment debtor to pay a judgment that has been recovered against him and that he may be sued in form *ex contractu* on such implied promise. A contract of that nature, however, which does not rest on the mutual assent of the parties thereto, but is forced upon the judgment debtor as the result of a legal implication—is not such a contract as the Federal Constitution was intended to protect against legislation tending to impair its obligation. This proposition is well established by controlling authority. *State of Louisiana, ex rel. Folsom*, v. *Mayor of New Orleans*, 109 U. S. 285, 288; *Garrison* v. *City of New York*, 21 Wall. 196, 203.

If the act of Congress of February 3, 1897, above quoted, is invalid, it is made so by virtue of the fifth amendment to the Federal Constitution, which, in so far as it is pertinent here, declares that "no person * * * shall be deprived of life, liberty or property without due process of law." This is a limitation on the power of Congress, and the question is, whether the attaching creditors will be deprived of a property right in the cattle which they have caused to be seized under the writ of attachment in their favor, if the act is given effect according to the manifest purpose of the lawmaker.

It is urged in behalf of the attaching creditors that the lien obtained by virtue of the writ of attachment was of such a nature that it could not be impaired by an act of Congress even if it had been passed prior to the entry of the judgment by default against J. R. Blocker, the mortgagor, and certain authorities are cited in support of that contention, notably *Day* v. *Madden*, 9 Colo. App. 464; *Mulnix et al.* v. *Spratlin et al.*, 10 Colo. App. 390; *Hall* v. *Stephens*, 65 Mo. 670, 681; and *Hannahs* v. *Felt*, 15 Iowa, 141; but three of these cases, the same being those that are first cited, were decided in states whose constitutions at the time declared that "no * * * law retrospective in its operation * * * * shall be passed," and in two of the cases the ruling to the effect that the lien of an attachment cannot be divested by a legislative enactment *at any time after the writ is levied*, appear to have been based mainly on the theory that to give an act of the legislature the effect of impairing an existing attachment lien, would conflict with the local constitutional provision last quoted. The Iowa decision in *Hannahs* v. *Felt*, *supra*, does not appear to have been made under the influence of such a constitutional provision as has been adopted in Colorado and Missouri. In that case, however, the decision denying the efficacy of a legislative act to discharge the lien of an attachment, was based principally on the ground that the act under consideration did not in terms attempt to divest such liens, but that its real purpose was to postpone for the time being sales of property belonging to persons in the military service, either under a mortgage or deed of trust, or by virtue of an execution under a judgment or decree. In so far, however, as that decision lends support to the claim that an attachment lien cannot be impaired *at any time* by legislative action, even where the legislature is not deprived of the power to pass laws that are retrospective in their operation, it is not only opposed to the decision of this court in *National Bank of Commerce* v. *Reithmann*, 49 U. S. App. 144, 25 C. C. A. 101, 79 Fed. Rep. 582, but to the decisions of other courts in cases where the question has been expressly raised and decided. *Freiberg et al.* v. *Singer et al.*, 90 Wis. 608; *Stephenson* v. *Doe*, 8 Blackford (Ind.), 508, 513. Considered as an original proposition the weight of reason, as well as the authorities on kindred questions, sustain the view that an attachment lien, at least until a final judgment is rendered in the case, may be impaired, displaced or destroyed by legislative enactments which are designed to have that effect and that attaching creditors have no just ground to complain of such legislation. A writ of attachment is nothing more than a remedy afforded by law for the collection of a

debt. It is like a *capias ad respondendum* and a remedy of that nature may be abolished at any time by the legislature which created it. The same proposition holds good with respect to all laws which merely provide remedies for the enforcement of rights or the redress of grievances. They may be modified or repealed without reference to the effect of such legislation on pending actions, the only limitation on the power of the legislature in this respect being, that an adequate remedy must remain or be provided for the enforcement of such existing rights as have their origin in private contracts. In actions *ex contractu* litigants are not entitled to insist that they shall be afforded the same remedies or be privileged to plead all of the defenses that were available when the contract was made or that have accrued subsequently under existing laws, the rule being that remedies, and those rights pertaining to the remedy which are purely of statutory creation, may be altered or abolished even after an action is instituted, provided an adequate remedy remains for rights founded on contract, and that some defenses such as those existing under usury laws and those that have accrued under statutes of limitation may be withdrawn and rendered of no avail. These principles are so familiar that a few cases only need be cited in their support. *Terry* v. *Anderson*, 95 U. S. 628, 633; *Campbell* v. *Iron Silver Min. Co.*, 83 Fed. Rep. 643, 645, 55 U. S. App. 150; *Wilson* v. *Simon*, 45 Atl. Rep. 1022; *Campbell* v. *Holt*, 115 U. S. 620, 628; *Ewell* v. *Daggs*, 108 U. S. 143, 151; *Morley* v. *Lake Shore Ry. Co.*, 146 U. S. 162, 168; *Van Hoffman* v. *City of Quincy*, 4 Wall. 535, 553; *Butler* v. *Palmer*, 1 Hill (N. Y.), 324, 329, 330; *Curtis* v. *Leavitt*, 15 New York 1, 152, 153; Sutherland on Statutory Construction, sec. 482. We are of opinion, therefore, that a legislative body like the Congress of the United States, which is not prohibited from passing retrospective or retroactive laws, has an undoubted power to divest or impair an attachment lien at least until there has been an adjudication that adequate grounds for the attachment exist and that the lien of the attachment be enforced. The power of Congress to deal with a remedy which it has provided for the collection of a debt does not cease as respects a suitor who has simply taken the initial steps to avail himself of the remedy but whose rights have not been finally adjudicated. The power in question continues, in any event, until such time as by making use of the remedy the suitor has acquired a title to or an interest in specific property which the parties to the action are no longer privileged to deny. It is only at such period that his rights can be said to have become vested. Prior thereto they are merely conditional or inchoate.

It is insisted, however, in behalf of the attaching creditors that they acquired a vested right or a vested interest in the cattle by the rendition of the judgment by default on January 29, 1897, which could not be impaired by a subsequent legislative enactment and that *this* proposition is tenable even if it be true, as last above held, that prior to that time the lien of the attachment might have been displaced by an act of Congress. With reference to this contention it may be said, that it is undoubtedly true that by the rendition of the judgment by default Blocker, the defendant in the attachment suit, lost his right to challenge the existence of the grounds of attachment on account of which the writ had been obtained, as well as the right to deny the fact of his indebtedness to the attaching creditors or the amount thereof. These were issues which the defendant in the attachment suit, and he alone, was entitled to raise. The Evans-Snider-Buel Company was not concerned therein and it is doubtful, to say the least, if it was entitled to be heard with respect thereto, since its right to the cattle depended on other considerations. But, be this as it may, the judgment by default did not determine as against the party last named who had intervened in the attachment suit, as it had a right to do, and had denied the right of the attaching creditors to subject the attached property to the payment of their claims, *that it could be so appropriated*. That was an issue which remained to be tried when the act of Congress of February 3, 1897, was approved, and it was in nowise affected by the judgment by default. It is difficult to understand, therefore, why the entry of that judgment changed the status of the case *co instanti* as respects the interpleader and deprived Congress thenceforth of the power to enact a law which prior thereto it possessed the power to enact. The interpleader's rights were not adjudicated, since the judgment by default did not determine that the lien asserted by the attaching creditors upon the cattle in controversy was superior to the lien which was asserted by the interpleader. That question remained undecided and was left open for future consideration and decision. The phrase "a vested right" has no very precise signification. It is an expression which is not used in the Federal Constitution nor in any of its amendments, the language of the fifth amendment being that "no person * * * shall be deprived of * * * *property* without due process of law." In the law of real property, where it is most frequently employed, the word "vested" is used to define an estate either present or future, the title to which has become established in some person or persons and is no longer subject to any contingency. And when the phrase "a vested right" or a "vested interest" is used in other

relations it may with reasonable precision be held to mean some right or interest in property that has become fixed or established and is no longer open to doubt or controversy. If the words in question are understood in that sense it cannot be said that the attaching creditors acquired a vested right to the cattle as against the interpleader, by the judgment in their favor against Blocker. Instead, however, of seeking for an exact definition of the phrase in question we think it will be more profitable for present purposes to refer to some of the cases, and particularly to those which are controlling authority here, where it has been held that rights acquired in virtue of existing laws and claimed to be vested, were *not* so far vested as to become property within the meaning of the Federal Constitution and to be for that reason beyond the reach of legislative action. Thus, in the case of *Morley* v. *Lake Shore & Mich. So. Ry. Co.*, 146 U. S. 162, a judgment had been obtained which under existing laws bore interest at a given rate. After its rendition the legislature reduced the rate of interest on judgments, doing so in language which made the act applicable to judgments that had been recovered before the act was passed. It was held that this law neither impaired the obligation of a contract nor deprived judgment creditors of their property without due process of law. In *Campbell* v. *Hoyt*, 115 U. S. 620, 628, the right to plead the statute of limitations against a personal indebtedness had accrued in favor of the debtor, when the bar of the statute was removed by the adoption of a new constitution. It was held that the debtor had no right to complain. The court said, "we certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right so as to be beyond legislative power in a proper case." In *Ewell* v. *Daggs*, 108 U. S. 143, a right which had accrued to a debtor to plead usury as a defense under a law that was in force when the contract was entered into, was taken away by a subsequent enactment and it was held that no valid objection could be urged against such legislation. In *Butler* v. *Palmer*, 1 Hill (N. Y.) 324, it appeared that at the time of the sale of a judgment debtor's land under an execution, the law allowed him a certain time to redeem and the master's deed specified this period of redemption on its face. A subsequent statute repealed the law granting such period for redemption and prescribed a shorter period within which the right must be exercised. It was held that the right to redeem within the period named in the master's deed was not so far vested that it could not be shortened by legislative action. See also *The People* v. *Livingston*, 6 Wend. 526.

In *Green* v. *Abraham*, 43 Ark. 420, a mortgage improperly acknowledged had been placed of record, which by reason of a defective acknowledgment was not notice to subsequent purchasers or lienors. Afterwards the mortgaged property was attached under a writ against the mortgagor, and thereafter the legislature validated the record of the mortgage. The mortgagee having brought replevin to recover the attached property from one who claimed it under the attachment, it was held, in substance, that the interest of the attaching creditor in the attached property was not vested but could be and that it was in fact displaced by the subsequent enactment validating the record of the mortgage. The following cases are similar to those already cited, and, as we think, uphold the same doctrine. *Freeborn* v. *Smith*, 2 Wall. 160, 175; *Baker's Executors* v. *Kilgore*, 145 U. S. 487; *Terry* v. *Anderson*, 95 U. S. 628, 633; *Garrison* v. *City of New York*, 21 Wall. 196, 205; *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 289; *Baugher et al.* v. *Nelson*, 9 Gill (Md.) 299, 309; *Town of Danville* v. *Pace*, 25 Grattan 1, 15; *Satterlee* v. *Matthewson*, 16 Serg. & Raw. 169; *Wilson* v. *Simon*, 45 Atlantic Rep., 1022. It may be difficult in some cases to fix the precise date at which a right can be said to be fully vested and for that reason to have become property within the meaning of the Federal Constitution, when the right in question is purely of statutory creation, or has been acquired by pursuing some remedy which the law affords to suitors, and is in no sense an obligation arising out of contract; but we are of opinion that the right invoked in the case at bar was not vested on February 3, 1897, in any such sense as to be outside the sphere of legislative control. When called upon to resolve questions like the one in hand the courts have never deemed it necessary to close their eyes to the equities of the case but have frequently permitted their judgments to be influenced by the consideration that that which the legislature has done in the way of disturbing rights acquired under existing laws—was morally right and in accordance with justice and fair dealing. In an early case (*Foster et al.* v. *The Essex Bank*, 16 Mass. 245, 273), Parker, C. J., remarked, "the truth is there is no such thing as a vested right to do wrong"; and this remark has been quoted with approval by the Supreme Court of the United States and other courts. *Freeborn* v. *Smith*, 2 Wall. 160, 175; *Freeland* v. *Williams*, 131 U. S. 405, 420; *Goshorn* v. *Purcell*, 11 Ohio St., 652; *Town of Danville* v. *Pace*, *supra*; *Satterlee* v. *Matthewson*, *supra*. And in *Randall* v. *Kreiger*, 23 Wall. 137, 149, the Supreme Court said, speaking with reference to a legislative act which impaired an existing title, "claims contrary to

justice and equity cannot be regarded as of that character (that is to say, as vested rights). Consent to remedy the wrong is to be presumed."

It is our privilege and duty, therefore, in determining whether a vested right has been violated and whether Congress exceeded its just power in validating the interpleader's mortgage, to consider whether its action was dictated by a sense of justice and was right when viewed from a purely moral standpoint. If it *was*, a more liberal view may well be taken of its power to displace the attaching creditor's lien than would be permissible if its action was partial or arbitrary and without just cause or excuse.

Viewing the case for the purpose last indicated, it is manifest at a glance that Congress was influenced by the highest considerations of public policy to pass the act of February 3, 1897, and that in so far as the interpleader and others in a like situation were concerned, it was justified in stretching its constitutional powers to their utmost limit to prevent the consummation of a grievous wrong. The cattle in controversy had been bought and paid for with the money of the interpleader with the understanding that they should be mortgaged to secure its repayment. Such a mortgage was executed. The transaction was fair and honest and all the publicity was given thereto which the circumstances permitted. We understand the local law to be that the mortgage so executed was in any event good as against the mortgagor, for such was the decision in *Main* v. *Alexander*, *supra*. The attaching creditors' debt was contracted long prior to the purchase of the cattle and the execution of the mortgage and they had actual knowledge of its execution and of the record thereof before they caused the writ of attachment to be levied. The attaching creditors seem to have made a deliberate attempt to appropriate the property of the interpleader to the payment of another's debt by taking advantage of a defect in the law, doing so in utter disregard of the doctrine which has been generally accepted by courts of equity since the decision in *LeNeve* v. *LeNeve*, 3 Atkinson 646, 2 Leading Cases in Equity, 35, that one who purchases property with full knowledge of another's interest therein and with intent to deprive him of that interest is a purchaser *mala fide*. Under these circumstances it was the duty of Congress to afford all the relief against the threatened wrong which could be afforded by a liberal interpretation of its legislative powers; and it is likewise the duty of the courts, in such a case, to construe those powers liberally, to the end that a wrong may not be perpetrated through the forms of law. It may be that there is a legal presumption that when Congress extended the chap-

ter of the Arkansas statute concerning mortgages over the Indian Territory, it was aware of the interpretation that had been placed upon the various provisions of that chapter by the Supreme Court of that state; but a legislative body is not omniscient, and whatever may be the presumption, we are unable to believe that Congress possessed such knowledge *in fact*, and that it intended to deprive nonresidents of the territory of the power to make a mortgage on personal property there located which would be effectual to protect mortgages against the claims of third parties. We can conceive of no reason which would be liable to influence Congress to enact a law of that character and are therefore constrained to believe that the peculiar construction placed on sections 4742 and 4743 of the mortgage act, by the Supreme Court of Arkansas, was unknown to Congress when they were made applicable to the Indian Territory, and that it made haste to cure what it deemed an obvious defect or omission in the law as soon as its attention was directed to the defect. The act of February 3, 1897, stands on the same plane, therefore, as a curative act and should be treated as a statute which was enacted for the purpose of remedying a mistake theretofore inadvertently made by the lawmaker. When the attention of Congress was directed to the peculiar construction that had been placed on the aforesaid sections of the mortgage act in the state from which it was borrowed, it found the controversy between the attaching creditors and the interpleader still pending and undetermined. The rights of the former were *in fieri*. No court had at that time decided that they were entitled as against the interpleader to subject the mortgaged property to the payment of their judgment against the mortgagor, and believing, doubtless, that such an adjudication, if made, would defeat rather than promote the ends of justice, it undertook to forestall a possible decision of that nature by validating the record of the interpleader's mortgage. We are of opinion that the concluding clause of the act of Congress of February 3, 1897, which was designed to accomplish that end, was a lawful enactment and not in conflict with any provision of the Federal Constitution, because at the date of its enactment the attaching creditors had no such vested right or interest in the cattle in controversy as the constitution was intended to protect against legislative action.

Learned counsel for the interpleader have argued at some length that the United States Courts in the Indian Territory were and are under no obligation to construe sections 4742 and 4743 of the chapter concerning mortgages as they were construed in *Main* v. *Alexander*, *supra*, because that decision is in conflict with other decisions of the

Supreme Court of Arkansas on kindred questions and because it has been discredited by judicial criticism in the State of Arkansas and cannot be regarded as settling the true construction of the statute in controversy even in the state where it originated. They also claim that the attachment writ only operated upon such interest in the cattle as the mortgagor had at the time the writ was levied and that this interest was a mere equity of redemption, the mortgage being in any event good as against the mortgagor. Some other propositions are also advanced, all of which have been noticed, but without expressing an opinion thereon, we prefer to rest our decision on the ground heretofore stated, that the act of Congress operated to validate the interpleader's mortgage.

The judgment of the United States Court of Appeals in the Indian Territory is accordingly *reversed* and annulled and the judgment of the United States Court in the Indian Territory for the Northern District thereof, which was rendered at its March term, 1899, being for the right party, is in all things

Affirmed.

Filed Jan. 4, 1901.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

W. P. McFADDEN *et al., Plaintiffs in Error.*

v.

EVANS-SNIDER-BUEL COMPANY, *Defendant in Error.*

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEAL FOR THE EIGHTH CIRCUIT.

Brief for Defendant in Error.

U. M. ROSE,
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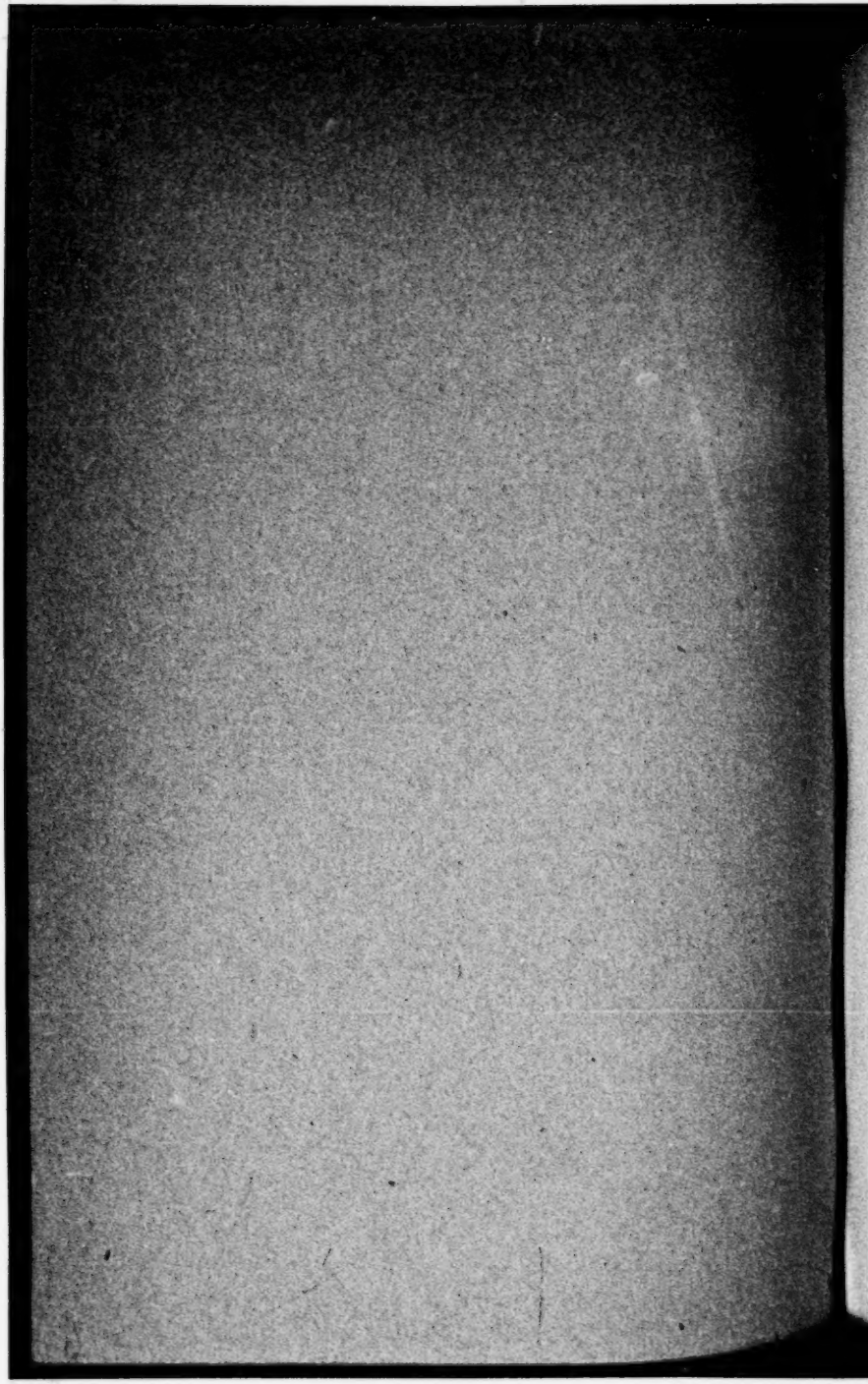
For Defendant in Error.

HENRY STEPHENS CO.



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I.

STATEMENT OF FACTS.

The Evans-Snider-Buel Company advanced to John R. Blocker about $130,000 to enable him to purchase cattle; to secure which advances Blocker executed to the Company two mortgages dated April 23, and May 19, 1896, covering about 6,775 head of cattle. The debts were evidenced by notes maturing at different periods in the future. The cattle were in the lands of the Creek Nation in the Indian Territory. The advances mentioned covered the entire purchase money of the cattle. The mortgages were duly and promptly filed for record in the clerk's office of the United States Court for the Northern District of the Indian Territory, that being the district

within which the mortgaged property was located. One of the mortgages, made to secure notes amounting to $122,184.60, was also recorded in Bexar County, Texas, where Blocker resided. The defendant in error is a corporation created and organized under the laws of Illinois.

On the 7th of June, 1896, McFadden & Son began a suit by attachment against Blocker in the United States Court for the Northern District of the Indian Territory, based on a judgment that they had recovered against him in Texas May 26, 1887, for $55,875.71. On the 29th of June, 1896, they sued out an attachment and caused it to be levied on the cattle embraced in the mortgages, knowing of the existence of the mortgages, and making use of the record of the mortgages for the purpose of getting a description of the cattle. This is a fact admitted of record.

The Evans-Snider-Buel Company gave an interpleader's bond in the penal sum of $150,000, and retained possession of the cattle. On the return of the writ they filed their interplea, claiming under the mortgages. Two days afterwards the plaintiffs took judgment against Blocker by default for $55,875.71. After that there were two trials of the issue arising on the interplea, resulting in a verdict each time for the interpleader.

The contest is the not unusual one between a mortgagee and attaching creditors. It appears in this case that the mortgagees paid full value for whatever rights they may have obtained, since they advanced to Blocker the entire purchase money of the cattle; also that, as the debt of the plaintiffs was contracted long before the cattle were bought, and the mortgages were executed, they have never paid out any money on the faith of the cattle, and have never been in any way misled or deceived concerning any fact involved in the present investigation.

The Supreme Court of the Indian Territory held that the mort-

gagee had no rights because there was no law providing for the registration of chattel mortgages made by non-residents, and because the mortgagee had not taken possession of the mortgaged property. On writ of error this judgment was reversed, and the last judgment of the trial court was affirmed, his honor Judge Sanborn dissenting. The plaintiffs McFadden & Son bring the case here by writ of error.

The Circuit Court of Appeals decided upon the sole ground that the defective registration was cured by act of Congress. As there are several other grounds leading to the same result, and equally conclusive, as we think, we shall present them also in this brief.

II.

Federal statutes extending constitution and laws of the United States over Indian Territory.

By an act of Congress entitled "An Act to provide a Temporary Government for the Territory of Oklahoma, to enlarge the Jurisdiction of the United States Courts in the Indian Territory, and for other Purposes," approved May 2, 1890, it was, among other things, provided as follows:

"Sec. 32. The Constitution of the United States, and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations, shall have the same force and effect in the Indian Territory as elsewhere in the United States."

26 Stat. U. S., 96.

III.

Federal statute extending Arkansas statutes over the Indian Territory.

The same statute contains the following provision:

"Sec. 31. That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that State of 1883, as published in 1884, in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act, or any act of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating to * * * Frauds, statute of * * * Mortgages, * * * chapter 110, to Recorders, chapter 126," and so on, designating various other chapters, including Attachments.

26 Stat. U. S., 94.

IV.

The intervention of the mortgagees and the requirements and effect of the pleadings.

This proceeding is had under sections 390-394 of Mansfield's Digest, authorizing third persons claiming attached property to give bond and interplead in the attachment suit.

The interplea is in the form of an ordinary intervention, and demands an answer from the attaching plaintiffs; and upon the interplea and the answer an issue is formed.

Deloach Milling Mfg. Co. *v.* Little Rock Milling Co., 65 Ark., 467.

The issue is between the interveners and the attaching plaintiffs alone; and the interveners are not affected by the judgment against the defendant in the attachment. That is *res inter alios acta.*

Huiscamp *v.* Moline Wagon Co., 121 U. S., 319.

Central Loan Co. *v.* Campbell, 173 id., 90.

Hershy *v.* Clarksville Institute, 15 Ark., 129.

Sannoner *v.* Jacobson, 47 id., 40.

Bloom *v.* McGehee, 38 id., 329.

Taylor *v.* Taylor, 3 Bush, 119.

Foster *v.* Goodwin, 82 Ala., 173, 2 So., 895.

Markley *v.* Keeney, 87 Iowa, 398, 54 N. W., 251.

Springer *v.* Bigford, 54 Ill. App., 198.

Otto *v.* Smith, 68 Miss., 773, 10 So., 70.

Waples-Platter Co. *v.* Low, 54 Fed., 95—Ct. App. 8th Ct.

Not only is it true that the issues between the plaintiffs and defendant and those arising on the interplea are distinct; but it is also true that the interpleader cannot controvert the plaintiffs' demand.

Sannoner *v.* Jacobson, *supra.*

Richmond *v.* Irons, 121 U. S., 53.

V.

The writ of error in this case brings up no question whatever for decision because the answer to the interplea charges no fraud.

It is certainly true that to render fraud available as a defense it must be pleaded.

Moss *v.* Riddle, 5 Cranch, 351.

Fogg *v.* Blair, 139 U. S., 126.

Jackson *v.* Reeve, 44 Ark., 496.

McIlroy *v.* Buckner, 35 id., 558.

And the facts relied on as constituting the fraud must be specifically stated in the plea or answer.

Hynson *v.* Dunn, 5 Ark., 395.
Dickson *v.* Burks, 6 id., 415.
Keller *v.* Vowell, 17 id., 447.
Conway *v.* Ellison, 14 id., 360.
Seaborn *v.* Sutherland, 17 id., 603.
Mock *v.* Pleasants, 34 id., 71.
Noonan *v.* Lee, 2 Black, 499.
Patton *v.* Taylor, 7 How., 159.
Ritchie *v.* McMullen, 159 U. S., 235.

VI.

There is no question before this court for decision, because no objection was raised to the introduction of the mortgages because of the clause allowing the mortgagor to retain possession.

The transcript shows the form which the objections to the mortgages and notes assumed:

"Plaintiffs object to the introduction of this mortgage, because it shows on its face that it was given on cattle situated in the State of Texas; that it was recorded in the State of Texas, the recording acts of which State have no force or effect upon cattle in the Indian Territory, and cannot have any force or effect on cattle which were at that time in Texas, and afterwards transferred to the Indian Territory, where they were afterwards levied upon."

The only objection made to the notes was that they were "secured by the mortgage."

The only other objection from the plaintiffs was as follows:

"We now renew our objection to the evidence offered to show that the money which was represented by these notes, and loaned to

Mr. Blocker, was invested in the cattle upon which the mortgages were given, and that said money represented by those notes was the purchase price of said cattle, and ask that all evidence pertaining to this matter be withdrawn from the consideration of the jury."

It is needless to say that this does not make the plaintiffs' case any better.

Whenever a party would object to the introduction of a written instrument he must point out the objection specifically.

Camden *v.* Doremus, 3 How., 515.

U. S. *v.* McMasters, 4 Wall., 680.

Moore *v.* Bank of the Metropolis, 13 Pet., 302.

Burton *v.* Driggs, 20 Wall., 133.

District of Columbia *v.* Woodbury, 136 U. S., 462.

And a party specifying his objection to the admission of evidence must be considered as waiving all others; or as conceding that there is no ground upon which they can be maintained.

Evanston *v.* Gunn, 99 U. S., 660.

Toplitz *v.* Hedden, 146 id., 255.

The questions discussed here were not raised either in the pleadings or the exceptions. One might read the entire transcript without suspecting that the questions argued here were even mentioned.

It is true that in this case there is a provision that the mortgagor shall remain in possession until the maturity of the notes; but we have found no decision holding that such a clause under any law avoids the deed. In the few States where under peculiar statutes it is required that a mortgagee shall take possession of the mortgaged property, the decisions, as far as we have been able to trace them, go to the effect of saying that it is the actual non-delivery, and not a clause stipulating for possession, that brings the case within the meaning of the statute. Such a clause may show the intention of the parties;

but a mere intention could not affect any one unless carried into execution. The clause in question may raise a suspicion: it does not prove a fact. In Marsh *v.* McPherson, 105 U. S., 709, it was held that "the recital in the contract that the vendors 'hereby deliver said machines at the places named in the list' to the vendee, passes to him the title and right of possession, but does not prove a delivery of actual possession."

It certainly cannot be contended that the agreement for possession written in the face of the mortgage is more objectionable than if made *dehors* the instrument by parol. In Huntley *v.* Kingman, 152 U. S., 535, the court held that "the chattel mortgage was not necessarily invalidated by the parol agreement that the mortgagor was to retain possession," though in that case the parol agreement also gave the mortgagor authority "to sell the goods at retail."

VII.

Conceding that the position assumed by the attaching creditors that the failure to record the mortgages and the failure to deliver possession of the mortgaged property to the mortgagee would avoid the mortgages on the ground of fraud, still the judgment of the trial court was correct, because there was no proof of such non-delivery.

There was not a syllable of testimony tending to show that the mortgagees did not take possession of the cattle at the time the mortgages were executed.

How were the trial court and jury to know that possession of the cattle did not follow the execution of the mortgage? How is this court to know it?

Undoubtedly fraud is not presumed, and even where alleged it must be proved.

"It is a universal rule in the construction of all deeds that fraud is never to be presumed. * * * The party that charges fraud is bound to prove it.

Conway, *ex parte*, 4 Ark., 356.

Doswell *v.* Adler, 28 id., 84.

Irons *v.* Reyburn, 11 id., 378.

"Fraud will not be inferred from an act which does not necessarily import it. It is never presumed, but must be proved; and circumstances of mere suspicion, leading to no certain results, are not sufficient proof of it."

Toney *v.* McGehee, 38 id., 427.

Splawn *v.* Martin, 17 id., 146.

Clinton *v.* Estes, 20 id., 216.

Erb *v.* Cole, 31 id., 554.

Southern Development Co. *v.* Silva., 125 U. S., 247.

By producing the mortgages and the securities mentioned in them the burden of proof was put on the attaching creditors.

Hempstead *v.* Johnson, 18 Ark., 123.

Hill *v.* Shrygley, 51 id., 57.

In this case the interpleader went farther, and proved that the securities represented so much money actually paid.

Where a creditor attacks a conveyance of his debtor for fraud the burden of proof is on him.

Cunningham *v.* Williams, 42 Ark., 170.

Colorado Coal Co. *v.* U. S., 123 U. S., 307.

"An interpleader who claims attached property under a purchase from the debtor before the issue of the attachment, must prove the purchase, but need not prove affirmatively that it was not fraudulent."

Stephens *v.* Oppenheimer, 45 Ark., 492.

And the fraud must be clearly proved.

Holt *v.* Moore, 37 Ark., 146.

Fitzgerald *v.* Walker, 55 id., 153.

"The law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and anyone who alleges that such acts are done in bad faith, or for a dishonest or fraudulent purpose, takes upon himself the burden of showing the same."

Jones *v.* Simpson, 116 U. S., 615.

Walker *v.* Collins, 70 Fed., 70—Ct. App. 8th Ct.

In Nebraska the statute provides that all sales, mortgages, etc., of personal property shall be null and void "unless the same be accompanied by an immediate delivery," unless it shall be made to appear on the part of the persons claiming under such sale, etc., that the same was made in good faith, and without any intent to defraud such creditors or purchasers. In First National Bank *v.* Lowrey (Neb.), 54 N. W., 571, the court said:

"When the vendee or mortgagee establishes both good faith and the absence of fraud, the legal presumption of fraud arising from his failure to take possession of the property is overcome. By defendant's request No. 2 the plaintiff was not only required to prove good faith, and the absence of an intent to defraud, but the jury were told that it 'must satisfactorily explain to you why there was not immediate delivery of said property, and an actual and continued change of possession thereof.' The portion of the request just quoted was erroneous, and should not have been given."

VIII.

Legislation in Arkansas relating to mortgages and deeds, and judicial construction.

On the admission of Arkansas into the Union in 1836 a commission was created for the purpose of preparing and submitting such statutes as might seem expedient. They reported a series of statutes forming a statutory code known ever since as the *Revised Statutes,* printed in 1838. The different chapters of this collection were approved on different days; but they were all passed during the legislative session of 1837-38.

With the exception of some amendments that will be noted, all of the registration statutes relating to deeds and mortgages hereafter referred to formed a part of the *Revised Statutes,* and were carried forward in *Mansfield's Digest,* published in 1884; and they all form a part of the laws of the Indian Territory.

The Revised Statutes provided as follows:

"For the purpose of construction the Revised Statutes passed at the present session of the general assembly shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times."

Revised Stat. Ark., p. 697, sec. 24.

The Revised Statutes went into effect on a day fixed by proclamation of the governor, of which we shall speak presently.

The section as to the registration of mortgages is as follows:

"*Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before;* which filing shall be notice to all persons of the existence of such mortgage."

Revised Stat. Ch., 101, sec. 2.

The first case that came up was Main *v.* Alexander, 9 Ark., 112 (1848). The plaintiff claimed under a chattel mortgage. It was filed for record; but, the certificate of acknowledgement not being formal, the registry was not good for the purpose of constructive notice. The property was attached. The mortgagee filed a bill to foreclose, making the attaching creditors defendants, and charging them with actual notice of the mortgage prior to the issue of the attachments. The attaching creditors answered, not denying actual notice, but denying that the mortgage was a lien, because it had never been properly acknowledged and recorded.

The opinion delivered was one of the most perfunctory that ever emanated from a court of last resort. The court cited no authority, and gave no reasons; it only said:

"The instant it (the attached property) passed into the custody of the law it went out of the reach of all persons having mere inchoate rights; and those rights, if not utterly destroyed, must at least remain in abeyance until the property shall be legally released from the grasp of the attachment. The law regards a mortgage which has not been acknowledged and filed for record as a fraud upon the rights of strangers; and consequently it will not countenance and uphold it in opposition to such rights."

It would be useless to try to derive any meaning from the first of these sentences. If it means—what possibly it was intended to mean—that an attachment supersedes all prior liens, and renders subsequent liens impossible, it is plainly incorrect. The second proposition, though more intelligible, is equally untenable. There was not a circumstance on which a presumption of fraud could be based. The mortgagee had filed the mortgage for record, and had shown a disposition to give it all of the publicity possible. It was not his fault that the officer taking the acknowledgement had blundered in writing his certificate. It was inconceivable that the mortgagee

should have colluded with the officer to obtain a defective certificate that would invalidate the registration, since such an act could harm no one but himself. Under such circumstances there was no indication of fraud. Everything pointed the other way.

Kirby *v.* Tallmage, 160 U. S., 387.

Nevertheless the mortgagee not only lost his security, but his name was handed down to posterity tarnished with judicial condemnation of having committed a fraud. Such is human justice when at its worst. If the court could have foreseen later acts of injustice that would be perpetrated under the rule thus inflicted they surely would have considered the question submitted with a little more care.

What is very singular is that this decision was made in plain violation of another section of the same statute which the court was then essaying to construe.

The section, with one preceding it, is as follows:

"6. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, as against creditors and purchasers prior and subsequent, shall be void.

"7. This act shall not extend to any estate or interest in any lands or tenements, goods or chattels, or any rents or profits out of the same, *which shall be upon a valuable consideration and bona fide and lawfully conveyed;* nor shall this act be construed to avoid any deed or sale to a subsequent *bona fide* purchaser from the grantee for valuable consideration and without any notice of fraud."

Revised Stat. Ch. 65, secs. 6, 7.

This statute is still in force, and has now to be applied by this court.

Mansf. Dig., sec. 7379.

We must now invite the attention of the court to the corresponding statute relating to the registration of deeds.

The Revised Statutes contained this provision:

"No conveyance required by the provisions of this act to be recorded *shall be valid or binding, except between the parties and their legal representatives, until the same shall have been deposited in the recorder's office for record;* not even then if shown to be made with intent to defraud prior creditors or purchasers; but shall be void against such prior creditors or purchasers."

Rev. Stat. Ch., 65, sec. 6, title "Frauds."

This statute still remains in force.

Mansf. Dig., sec. 3378.

As if this language was not sufficiently rigorous the legislature on the 19th of December, 1846, passed the following act, which still remains in force:

"No deed, bond or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, *shall be good or valid* against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; *or* against *any creditor* of the person executing such deed, bond or instrument, *obtaining a judgment or decree, which by law may be a lien upon such real estate,* unless such deed, bond or instrument, duly executed and acknowledged, or approved, as is, or may be, required by law, *shall be filed for record* in the office of the clerk and *ex-officio* recorder of the county where such real estate may be situated."

Mansf. Dig., sec. 671.

Frauds may be perpetrated by deeds with as much facility as by mortgages. Of the two sections that relating to deeds is more stringent than that relating to mortgages. The mortgage is to be no lien, and the deed is to be void except as between the parties, until recorded.

Without section 7 of chapter 65, which was evidently overlooked, the court should have held that by a rule of law which had been long established, and which it was soon to announce, it was a fraud for an attaching creditor to seize property which he knew belonged to another; and that no statute should be so construed as having been intended to promote and encourage fraud. But the section last cited was a legislative declaration that disposed of any controversy on the subject most effectually. The statutory rule was perfectly honest and just; and was the same rule that the courts have always laid down. The justice of the statutory rule was unquestionable, and the opposite rule would open the door to innumerable frauds.

Suppose that A conveyed lands successively to B and C, the latter knowing when he got his deed that B had just bought and paid for them, and had got a deed; but, trusting that because B was old or sick, or had a poor horse, or none at all, he could first get his deed filed for record, and should actually succeed in doing so, could C then stand up in a court of justice and say "I knew all of the facts; and that B had paid ten times as much as I did, or a hundred times as much; and in fact, if you please, I paid nothing at all; it matters not, but the only legal question is one of speed; and I got to the office of the recorder first?" And if he should do so, would he be justified by law in such an act of spoliation over the other man who paid full value and had got his deed?

This was the precise question that came before the court in Byers *v.* Engles, 16 Ark., 543 (1855). It was thoroughly discussed, and an elaborate opinion, consistent with the authorities, was rendered.

The action was ejectment; and the contest was between an execution purchaser as plaintiff and a prior purchaser at private sale holding under an unregistered deed, but of whose existence notice was first given at the time of the sale under execution; and it was held that the right of such prior purchaser prevailed over the claim of the purchaser under execution.

The court also held that possession of the land by the defendant holding under the unregistered deed was alone equivalent to notice to the purchaser under the execution, though other notice was actually given.

Possession is only constructive notice.

Hamilton *v.* Fowlkes, 16 Ark., 373.

Certainly actual notice, admitted of record, cannot be less efficacious than a species of implied notice which may have been no notice at all. If the converse is true then a part may be greater than the whole.

The court base their decision largely on the case of Le Neve *v.* Le Neve, 3 Atk., 646, 2 Lead. Cas. Eq., 35, decided by Lord Hardwicke nearly 200 years ago. In that case the act of parliament required all deeds to lands in Middlesex to be registered, and provided that if not registered they should be "adjudged *fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim.*"

After citing various cases, Lord Hardwicke said:

"The ground of it is plainly this: That the taking of a legal estate after a notice of a prior right, makes a person a *mala fide* purchaser; and not that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear legal right of the

estate, *and after knowing that* he takes away the right of another person by getting the legal estate. *Now if a person does not stop his hand, but gets the legal* estate when he knew the right was in another *machinatur ad circumveniendum.*"

It is needless to say that this righteous decision of that great judge has become one of the fundamental principles of jurisprudence.

The court in Byers *v.* Engles quote from Chancellor Kent, saying that this "is a settled rule in the English and American law."

In speaking of the rule thus laid down, Mr. Pomeroy says:

"This question was presented to the English courts of chancery at an early day, and was settled by them in accordance with the general principles of equity; and their decisions have with great uniformity been adopted and followed by the American courts. * * *

"This conclusion, reached originally by the court of chancery, has in England furnished a rule for that tribunal alone, and has not been accepted by the courts of law; in this country it is recognized and enforced alike by the courts of equity and of law, for the reason that both have jurisdiction in matters of fraud. The doctrine is, in fact, a mere application of the broader general principle, that a person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will be held a trustee for the benefit of the person whose right he sought to defeat."

2 Pom. Eq., sec. 659.

See also

Kerr, Fraud and Mistake, p. 266, and cases cited.

Priest *v.* Rice, 1 Pick., 166, and cases referred to in note.

In speaking of this rule the court in Byers *v.* Engles was extremely explicit:

"But if this information is attained by other means (than by registration), the object of the act is accomplished, and on the prin-

ciple that when the reason ceases the law becomes inoperative, and its sanctions do not attach. (P. 551.)

"These interpretations show the reason of the law; from which it is evident that *notice is equivalent to registration as to all persons.* (P. 553.)

"As the object of the statute was to prevent fraud by means of secret conveyances, when the conveyance is open, and the creditor has notice, the means by which it is communicated is comparatively unimportant." (P. 548.)

Two years before the decision in Byers *v.* Engles the same question, arising on the same statutes, was decided by the Federal court sitting at Little Rock, and the like conclusions were reached; and that decision was affirmed in this court.

Merrill *v.* Dawson, Hempst., 563.

Fowler *v.* Merrill, 11 How., 375.

This court has often declared the same doctrine as to actual notice.

Black *v.* Zacharie, 3 How., 512.

Bridgewater Iron Co. *v.* Lissberger, 116 U. S., 8.

Mills *v.* Smith, 8 Wall., 27.

In Hitz *v.* National Bank, 111 U. S., 728, the statute provided that deeds, mortgages, etc., should be valid as to creditors and subsequent purchasers from the time they should "be delivered to the recorder of deeds for record, *and from that time only.*" The court held that an unrecorded deed conveyed a right inferior to that of a subsequent execution creditor solely on the ground that the creditor had no notice of the deed.

As the registration statutes relating to mortgages and those relating to deeds were equally rigorous, this decision in Byers *v.* Engles was not based on any process of construction, but on a principle independent of the statutes, applicable alike to conveyances of all

kinds; the principle that a statute made to prevent fraud shall never be allowed to be made an engine of fraud.

There is nothing in the statute of frauds about a part performance; but, as was said in Blakeney *v.* Ferguson, 8 Ark., 278, where the plaintiff has in good faith partly performed an oral contract, "not to decree specific performance, would be to practice a fraud upon him."

Lord Westbury said:

"The court of equity has from a very early period decided that even an act of parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of parliament intervenes, the court of equity, it is true, does not set aside the act of parliament; but it fastens on the individual who gets a title under that act, *and imposes on him a personal obligation,* because he applies the act as an instrument for accomplishing a fraud."

McCormick *v.* Grogan, L. R., 4 H. L., 97.

Vice Chancellor Shadwell, in Duke of Leeds *v.* Earl of Amherst, 20 Beav., 239, said:

"I take it that the general wisdom of mankind has acquiesced in this, that the author of a mischief is not the party who is to complain of the result of it; but he who has done it must submit to have the effects of it recoil upon himself. This, I say, is a proposition which is supported by the Holy Scriptures, by the authority of profane writers, by the Roman civil law, by subsequent writers upon civil law, by the common law of this country, and by the decisions in our own courts of equity."

It is true that in Byers *v.* Engles the lien was that of an execution, while here the lien claimed is by attachment. But an attachment is only an execution issued before judgment; and both writs are subject to the same rules.

Grubbs *v.* Ellyson, 23 Ark., 287.

Meadow *v.* Wise, 41 id., 289.

Beard *v.* Wilson, 52 id., 291.

In Byers *v.* Engles, Chief Justice English, an Alabama lawyer by birth and education, dissented, going off on the Alabama doctrine that notice in such cases, in order to be effectual, must be given *before judgment is rendered.*

It must be obvious that Byers *v.* Engles overruled Main *v.* Alexander on every point.

If it was a fraud for a creditor with notice to levy an execution on the property of an innocent third person, the same rule would necessarily apply to an attaching creditor under similar circumstances.

Hannah *v.* Carrington, 18 Ark., 105, came before the court in 1856. There were but three judges on the bench in those days; and Judge Walker, who had delivered the opinion in Byers *v.* Engles, had been succeeded by another judge. Both parties were represented by eminent counsel. Their briefs, printed with the report, show that neither of them referred to Main *v.* Alexander, evidently because it had been overruled, and they knew it. But English, C. J., mindful of his dissent in the previous case, cited Main *v.* Alexander with approval, and thus put that cold snake in circulation again, though the citation amounted only to a *dictum*, as there was no allegation or evidence of notice, and the sale under the mortgage was held to be void on the ground of actual fraud unconnected with the registration laws.

In Jacoway *v.* Gault, 20 Ark., 193 (1859), the mortgage was defectively acknowledged; but was recorded. There was no evidence of actual notice. English, C. J., delivered the opinion, holding that the constructive notice was insufficient. Carnall *v.* DuVal, 22 id., 141 (1860), was peculiar; a mortgage made by agent under power of attorney. The mortgage was recorded, but not the power of attor-

ney, though that was exhibited to the recorder, Carnall. The statute required that both should be recorded. Later Carnall bought under execution, doubtless for a trifle, as he alone probably knew of the defect by reason of his official position; and it was held that he was not bound by the actual notice that he had received. Fairchild, J., who delivered the opinion, expressed his disapproval of the doctrine in Main *v.* Alexander, though the other two judges thought that it ought not to be overruled. In the opinion the court (p. 141) intimate that if there had been a charge of fraud against Carnall it might have been sustained. In Haskell *v.* Sevier, 25 id., 159 (1867), the court held that an unrecorded mortgage was valid as against the estate of the mortgagor and his general creditors. The other cases where Main *v.* Alexander has been cited, are Neal *v.* Spiegel, 33 id., 63 (1878), Martin *v.* O'Bannon, 35 id., 65 (1879), Wright *v.* Graham, 42 id., 141 (1883), Watson *v.* Thompson Lumber Co., 49 id., 85 (1886), Ringo *v.* Wing, id., 458 (1887), Hawkins *v.* Files, 51 id., 417 (1887), Dodd *v.* Parker, 40 id., 539 (1883).

It may be remarked of these cases that in a number of them they went off on other points; and that in none of them did the court repeat the so-called reasons given in Main *v.* Alexander, or substitute any other reason.

Though the doctrine of Main *v.* Alexander has become a rule of property, the court has limited its operation wherever possible. Thus it does not extend to a lien reserved in a deed, or to an equitable mortgage; or free one from the implication arising from recitals in his title papers, and does not apply to a mortgage to the State.

Martin *v.* Schichtel, 60 Ark., 595 (1895).

Stephens *v.* Shannon, 43 id., 464 (1884).

Taliaferro *v.* Barrett, 37 id., 511 (1881).

Memphis R. Co. *v.* State, 37 Ark., 632 (1881).

Nor does it apply where the mortgagee goes into possession.

Applewhite *v.* Harrell Mill Co., 49 id., 279 (1887).

Garner *v.* Wright, 52 id., 385 (1889).

And still a chattel mortgage does not cease to be a mortgage or become a pledge because of the transfer of possession.

1 Pow. Mort., 3.

Not only has the court restricted the dominion of Main *v.* Alexander in various ways; but it has frequently expressed a regret that the decision was ever made.

In Mitchell *v.* Wade, 39 Ark., 386, the court said:

"We should be loth to extend the rule in Main *v.* Alexander, * * * so far as to apply it to a constructive mortgage like this, and *thereby assist in the perpetration of a fraud.*"

In Ford *v.* Burks, 37 Ark., 94, the court said:

"This ruling (as to notice of mortgages) has been on the language of the statute, and has now become a rule of property which cannot be safely disturbed save by the prospective operation of a statute."

In Wright *v.* Graham, 42 id., 148, the court said:

"As long as this court feels constrained to adhere to its ruling in the case of Main *v.* Alexander, 9 Ark., 112, the registration of a mortgage defectively acknowledged conveys no notice; and the mortgage itself is absolutely void as against all the world save parties, even with actual notice."

In Martin *v.* Ogden, 41 id., 192, the court, in reference to Main *v.* Alexander, said:

"These rules have now become so fixed that it would be unwise in this court to attempt their change or modification. Whatever in them there may be incongruous or shocking to a sense of equity, has resulted from efforts to effect legislative intention; and it devolves on the legislature *to bring our equity jurisprudence in harmony with the moral sense of the most civilized peoples.* The simple question

left for us here is, was this mortgage fraudulent, either in fact or by legal presumption?"

This was an appeal for legislative relief.

Mr. Pomeroy says that the rule in Main *v.* Alexander prevails in one or two States.

2 Pom. Eq., sec. 659, n. 1.

As far as we have examined the statutes of other States are so various as to make comparisons useless.

In Ohio, in an early day, the supreme court adopted the rule laid down in Main *v.* Alexander; but the time came when it was looked upon with regret. In White *v.* Denman, 1 Ohio St., 110, the court said:

"If the question involved here had not been determined by adjudication in this State, *and affirmed and adhered to for a number of years*, a majority of this court would feel constrained to take a different view of it."

The theory of absolute presumption of fraud could not be long indulged without exciting the most poignant regrets. The Supreme Court of Pennsylvania said:

"In seeking to catch rogues it is not the proper function of the courts to ensnare honest men. We may become so zealous against fraud as to restrain the free action of honesty; a result that would be most disastrous. Better that many frauds should go undetected than the means of detection or prevention should treat honest men as guilty, or teach men to be always suspicious of their neighbors, and watchful that honest acts be precisely measured according to the standard of legal morality."

Hugus *v.* Robinson, 24 Penn. St., 11.

Cabell, J., said:

"I have found myself compelled as judge to pronounce transactions to be fraudulent and void as to creditors which were known

to be perfectly fair and *bona fide*, and were not intended or calculated to delay, hinder or defraud creditors."

Davis *v.* Turner, 4 Gratt., 471.

Some of the courts kept on in the same old way, consoling themselves by saying:

"Cæsar did never wrong but with just cause."

But other courts found this slavery to an unjust fiction quite intolerable. Such was the case in Virginia. In the case last cited the court overruled the whole doctrine, saying that the conclusive presumption as a test of a fraudulent purpose has no claim to certainty; that on the contrary it concedes its own fallibility by crushing mercilessly the most convincing evidence of fairness and good faith.

This court is sitting here as the court of last resort of the Indian Territory, the welfare of whose inhabitants is now entrusted to its keeping. If the pernicious quality of a rule has, after many years of experience, been verified, and repeatedly proclaimed by the court that made it, shall this court now *ex mero motu* inflict it on a new and helpless population sufficiently tried already?

While limitations have been constantly applied from time to time to the rule in Main *v.* Alexander, the doctrine laid down in Byers *v.* Engles has been repeatedly approved and expanded to meet new cases. In the case of Shinn *v.* Taylor, 28 Ark., 523 (1873), the rule was extended to the case of one holding under an unregistered title bond as against an execution purchaser having notice, given at the time of the sale. (P. 526.) In Jackson *v.* Allen, 30 id., 114 (1875), counsel endeavored in vain to obtain a ruling that notice after judgment was unavailing. The rule in Byers *v.* Engles was extended to one claiming under a *lis pendens* as against a purchaser under execution in Pindall *v.* Trevor, 30 id., 266 (1875). In Atkinson *v.* Ward, 47 id., 540 (1886), it was held that where a purchaser was in possession

of land at the time of a sale under execution such possession was constructive notice against the execution purchaser of whatever title the possessor had. In Tennant *v.* Watson, 58 Ark., 252 (1893), the doctrine of Byers *v.* Engles was extended to all equitable claims.

Byers *v.* Engles has also been approved in the following cases:

Jones *v.* Fletcher, 42 id., 450 (1883).

Wilson *v.* Slaughter, 53 id., 139 (April 12, 1890).

Williams *v.* McIlroy, 34 id., 92 (1879).

Apperson *v.* Burgett, 33 id., 336 (1878).

Doswell *v.* Adler, 28 id., 85 (1872).

IX.

This case falls within exceptions to the rule laid down in Main v. Alexander well recognized by the Supreme Court of Arkansas.

The Supreme Court of Arkansas has made the following limitations in the rule announced in Main *v.* Alexander.

1. An unregistered mortgage is good as against the heirs and general creditors of a deceased mortgagor. In this case neither actual or constructive notice cuts any figure.

Haskill *v.* Sevier, 25 Ark., 152.

2. Where a chattel mortgage has been duly executed and registered in another State where the property at the time is situated, the lien of the mortgage is not destroyed by the removal of the property to this State, though the mortgage be not registered here; and one buying in this State from the mortgagor without notice takes subject to the mortgage lien.

Hall *v.* Pillow, 31 Ark., 32.

3. Conditional sales are not within the statute; and one buying from the vendee, even without notice, acquires no title.

Simpson *v.* Shackelford, 49 Ark., 63.

McIntosh *v.* Hill, 47 id., 363.

McRea *v.* Merrifield, 48 id., 160.

4. The doctrine of Main *v.* Alexander only applies to innocent purchasers for value, including, of course, mortgagees who make advances at the time of the execution of the mortgages, and purchasers at execution sales without notice.

Of course an attaching creditor with notice who has merely secured a lien, cannot stand in any better position than one that has obtained judgment, and has actually bought under it with notice of an outstanding claim.

In Byers *v.* Engles, 16 Ark., 549, the court said:

"That the lien of the judgment is subject to every equity that existed against land in the hands of the debtor at the time of the docketing of the judgment. The lien of the judgment can only operate on the interest which the debtor had at the time of its rendition. The judgment creditor is entitled to the debtor's real interest alone, subject to his equities as they existed at the date of the judgment. A lien amounts to but a security against subsequent purchasers and encumbrancers."

In the case of Moore *v.* The City of Little Rock, 42 Ark., 66 (1883), the facts were these:

The plaintiffs had a mortgage on a tract of land adjoining the City of Little Rock. Afterwards the mortgagee laid the land off into lots and blocks, and annexed them to the city. The mortgagors then foreclosed their mortgage and bought in the land. The city levied a tax on the lots and blocks as thus laid out, claiming that the streets had been dedicated to the city; and the plaintiffs brought a suit to enjoin the collection of the tax on the ground that they were not bound by the platting of the lands and the dedication of the streets by the mortgagee.

It appeared that the mortgage, though recorded, had not been legally acknowledged; and the city claimed that the mortgage was void as to it. But the court said:

"The defect in the certificate of acknowledgment is a matter with which the city has not the remotest concern, and of which it can take no advantage. It was not a purchaser for value."

The same principle had been previously announced in the case of Hill *v.* Coolidge, 33 Ark., 626 (1888), where, in speaking on this question, the court said:

"To this (the argument that the appellants were innocent purchasers) it may be answered that, they purchased at their own execution sale, and therefore were not, nor did they claim to have been, innocent purchasers; and no question as to notice arises in the case."

In Taylor *v.* Mississippi Mills, 47 Ark., 252 (1886), the court reaffirmed this doctrine, saying, "as against a deceived vendor an attaching creditor of a fradulent vendee is not an innocent purchaser for value."

In Ames Iron Works *v.* Kalamazoo Pulley Co., 63 Ark., 87 (1896), the court made the same ruling, saying:

"The consideration of a pre-existing debt, while good between the parties, will not bring the purchaser within the rule which protects him as a purchaser for value against one having superior equities."

The court also said:

"Certain *dicta* in other cases where this question was not involved have encouraged counsel to say that the rule they contend for has been expressly recognized by this court. * * * But the question under consideration is now for the first time squarely presented; and we conclude that the doctrine announced in the beginning of this opinion is more in accord with reason and justice, and is supported by abundant authority."

In Willams *v.* McIlroy, 34 id., 92 (1879), the court said:

"Appellee purchased under his own execution, parted with nothing on his bid, and was not an innocent purchaser for value without notice."

In Tennant *v.* Watson, 58 Ark., 252, the court reviewed all of its previous decisions at length, and declared, referring to and confirming the doctrine in Byers *v.* Engles, that a purchaser of property under execution in his own favor takes it charged with all the rights and equities which might be asserted against the defendant in the execution of which he had notice before the sale.

The court said:

"Apellants *purchased at a sale under a judgment in their favor,* and are therefore not innocent purchasers for value, *and acquired nothing.*"

The ruling in Newman *v.* Davis, 24 Fed. Rep., 612 (1885), on this point, right in every other respect, has not been followed by the Supreme Court of Arkansas.

It is very clear that the court in Watson *v.* Thompson Lumber Company, hereafter referred to, did not intend to overrule this principle.

The court reached the same conclusion in the cases first cited that was announced by this court in People's Savings Bank *v.* Bates, 120 U. S., 556. It was urged in the court below that the case of Ames Iron Works *v.* Kalamazoo Pulley Company should not be considered because it was decided after the extension of the Arkansas statutes over the Indian Territory. That might be true if the decision in that case had made any change in the existing law; but it did not. It simply recapitulated previous decisions, and rested the result on the doctrine announced in Moore *v.* Little Rock and previous cases.

In Ober *v.* Gallagher, 93 U. S., 207, the court, in order to ascer-

tain the settled rule of property in Arkansas, referred to and cited a statute passed long after the contract was made, and after the suit was commenced, though the statute was not retrospective, and disregarded a recent State decision not in line with others on the same point.

But suppose that we admit that the court should not consider Ames Iron Works *v.* Kalamazoo Pulley Co., what is the result? Only that the attachment creditors find themselves in no better attitude. Certainly Moore *v.* Little Rock has never been overruled; neither have the other cases on this point except Main *v.* Alexander. If the attaching creditors discard the case last mentioned, they must go back to Pindall *v.* Trevor, 30 Ark., 266 (1875), Pickett *v.* Merchants National Bank, 32 id., 369 (1877), Watkins *v.* Trapnall, 15 Ark., 73, and Jones *v.* McDowell, 42 Ark., 422 (1883), and to Byers *v.* Engles where it was held broadly that "a purchaser at execution sale, to which the rule of *caveat emptor* applies, gets no warranty of title by his deed; but takes the estate encumbered with all the equities upon it at the time of his purchase." This leaves the question of notice, actual or constructive, quite out of the case.

If there could be any doubt about our position that an attaching creditor in Arkansas is a mere volunteer, it will be dissipated when we come to consider hereafter cases in which courts of chancery correct mistakes.

It would seem to be undoubtedly the law that an attaching creditor is only a volunteer; necessarily so, for if he gets judgment eventually, and buys under it, and the judgment is reversed on error, he gets no title.

Fishback *v.* Weaver, 34 Ark., 569.

Boyd *v.* Roane, 49 id., 416.

Bank U. S. *v.* Bank of Washington, 6 Pet. 19.

The reason of the rule that a purchaser at an execution sale

holds free from claims of which he has no notice at the time of his purchase, is that it is desirable to encourage purchasers, so as to make the property bring as much as possible. This motive has no application to an attachment before sale.

X.

As to the rule that when a statute is borrowed from another jurisdiction the legislature is presumed to have intended to adopt decisions previously made construing it.

The force of the rule cannot be measured by any exact standard. It would seem to be weakened where a whole code is re-enacted, and where the adjudicatd cases are so numerous that a presumption that they were all in contemplation of the legislative mind would be unreasonable. Thus in 1868 the legislature of Arkansas re-enacted the Civil Code of Kentucky, which in that State had received a very technical construction. In Holliday *v.* Cohen, 34 Ark., 716, the court held that it was not bound by the Kentucky decisions. It not unfrequently happens that statutes recently passed receive a construction that is belied by more ample experience; and yet decisions known to be erroneous continue to be applied with undiminished rigor because they have become rules of property. In a new statutory domicile, the doctrine that we are considering is not strengthened by the rule of *stare decisis.*

Hunter *v.* Truckee Lodge, 14 Nev., 37.

The adoption of a system of laws in this manner affords a valuable opportunity for revision and selection, which fortunately was not neglected when the American courts took over the laws of England. Decisions that had been found to be more productive of evil than of good were discarded; as in the case of mortgages created

by deposit of title papers; a doctrine the establishment of which Lord Eldon had deprecated in Whitehead, *ex parte*, 19 Vesey, 209, and in other cases. The rule of course will not be followed where the court having it under consideration would overrule the construction of the borrowed statute if it had been previously made by itself. Morgan *v.* State (Neb), 71 N. W., 794.

Where a decision has not become a rule of property, and is palpably wrong, it can hardly be expected that an intelligent court will follow it.

The rule in question is much less imperative than that which constrains the federal courts to follow the decisions of the State courts in the construction of State statutes; because the latter rule rests upon a statutory command.

The State decisions are not followed unless a rule of construction has become settled.

Pease *v.* Peck, 18 How., 599.
Burgers *v.* Seligman, 107 U. S., 33.
Roberts *v.* Bolles, 101 id., 128-129.
Penn *v.* Bowler, 107 id., 541.
Ober *v.* Gallagher, 93 id., 207.

There are no contradictions in nature; and whenever two decisions are in palpable contradiction one or the other must necessarily be wrong.

In Gelpcke *v.* Dubuque, 1 Wall., 176, it was held that the federal courts will not necessarily follow decisions which may prove but oscillations in the course of judicial settlement of the law. In that case the court said:

"We are not unmindful of the importance of uniformity in the decisions of this court and those of the highest local courts to the constitutions of their own States. It is the settled rule of this court in such cases to follow the decisions of the State courts. But there

have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice and the law because a State tribunal has erected the altar and decreed the sacrifice."

In Whitney *v.* Fox, 166 U. S., 647, the court said:

"While it is the ordinary rule to accept the interpretation given to the statute by the courts of the country by which it was originally adopted, the rule is not an absolute one, to be followed under all circumstances."

This court expressed itself very fully on this subject in Butz *v.* Muscatine, 8 Wall., 582, as follows:

"There are several adjudications of the highest court of the State more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. This duty carries with it investigation, reflection and the exercise of judgment. It cannot be performed on our part, by blindly following in the footsteps of others, and substituting their judgments for our own. Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the constitution which called this court into existence.

"Our duty depends upon the questions involved, and not upon the channel through which the case comes before us. Where the settled decisions in relation to a statute, local in its character, have become rules of property, these remarks have no application. In such cases this court will, as it has always done, follow such adjudications.

The cases of a different character, involving State statutes, in which the adjudications of the courts of the States in relation to them have been departed from by this court, extend in an unbroken series from an early period after its organization to the present time."

One of our positions is that under the registration laws, actual notice, when undisputed, is equiqalent to registration; a rule not dependent on the niceties of statutory construction, but on a salutary principle of equity of universal application. The question might have been answered either one way or the other. Unfortunately the Supreme Court of Arkansas has answered it both ways. We wish to be plainly understood as saying that in our view *the question is not one of statutory construction, but is one of general jurisprudence.*

XI.

Where the statute does not provide for the registration of a particular species of written instrument, such instrument, being outside of the statute, is nowise affected by it.

This would seem to be a truism; but it was not so decided in Watson *v.* Thompson Lumber Company, 49 Ark., 85 (1886). Of course there are many instruments, such as bills of sale, that are not within the registry acts.

The statute relating to the recording of mortgages as first enacted in the Revised Statutes was as follows:

"All mortgages, whether for real or personal estate, shall be acknowledged before some person authorized by law to take the acknowledgments of deeds, and shall be recorded, if for lands, in the county or counties in which the lands lie; and if for personal property in the county in which the mortgagor resides."

Revised Statutes, Ch. 101, sec. 1.

This statute was amended March 1, 1877, so as to read as follows:

"All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner as deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded,—if for lands in the county or counties in which the lands lie;—and, if for personal property, in the county in which the mortgagor resides."

Acts 1877, p. 17.

Mansfield's Digest, sec. 4742.

It will be observed that this statute makes no provision for recording mortgages of personal property where the mortgagor does not live in the State.

That this was a merely casual oversight is apparent enough. There could be no motive of public policy in forbidding nonresidents to mortgage personal property lying within the State; a fact that is distinctly manifest because when attention was called to the defect the State legislature and the Congress of the United States both promptly intervened for the purpose of supplying the omission.

Notice seems not to have been called to this defect until the case of Watson v. Thompson Lumber Company came before the courts. In that case the Thompson Lumber Company was a foreign corporation doing business in Clay county, Arkansas. It executed a mortgage to McMillion & Ebbert on lands and personal property situated in Clay county, where it was doing business; and the mortgage was duly recorded in that county. Creditors of the corporation recovered judgment against it, and sued out executions which were levied on a part of the personal property. McMillion & Ebbert assigned their claim and mortgage to Watson, who brought a suit to foreclose, making the creditors defendants.

The court held that as there was no statute providing for the

recording of a mortgage of personal property executed by a nonresident, the registration in Clay county did not create a lien; and that the claim of the execution creditors was superior to that of the assignee of the mortgage as to the personalty included in it.

Attention having thus been directed to this anomalous condition of the law, the legislature on the 5th day of February, 1891, amended the statute last above copied by adding these words:

"*Provided,* That if the mortgagor is a nonresident of this State the mortgage shall be recorded in the county in which the property is situated at the time the mortgage is executed."

Acts 1891, p. 6.

Sandels & Hill's Digest, sec. 5090.

By act of Congress of February 3, 1897, it was enacted as follows:

"Section 4742 of Mansfield's Digest of the laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: *Provided,* that if the mortgagor is a nonresident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated."

Stats. 1896-1897, p. 510.

For the present we will defer the consideration of these two statutes, and will direct our attention to the decision in Watson *v.* Thompson Lumber Company. An abstract of the brief for appellant is included in the report, showing that the case went off on points not argued. That it was wrongly decided is a proposition that, we think, admits of demonstration. We have referred with some care

to the cases cited in the opinion; and find that none of them is in point. Now let us notice them.

In Stewart *v.* Platt, 101 U. S., 735, the statute of New York provided that a chattel mortgage should be filed in the town or city where the mortgagor, if a resident of the State, should *reside* at the time of its execution. The mortgagors resided in Westchester county; but were doing business in the city of New York, where the mortgaged property was situated. The mortgage was filed for record in New York, and not in Westchester county. Following New York decisions the court held that the claim of the mortgage was inferior to that of judgment creditors who had obtained liens. The statute in that case expressly provided that *"every mortgage which should not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged should be absolutely void as against" creditors and purchasers,* unless filed for record as prescribed in the statute.

There is no such statute in Arkansas; and the law is just the reverse. But there is another important difference. By the Arkansas statute the case of a mortgage of chattels situated in the State belonging to a nonresident was wholly omitted; but the New York statute provided that where the mortgagor was a nonresident the mortgage might be recorded in the county or town in which the property was situated. And as this statute was not complied with, and the property was not delivered to the mortgagee, by the very terms of the statute it was void.

In Cook *v.* Hager, 3 Colo., 386, the statute required that a chattel mortgage should be acknowledged "before any justice of the peace, in the justice's district in which he (the mortgagor) may reside." As the mortgagor, a foreign corporation, did not reside in the State, it was held that though the mortgage was acknowledged before a justice of the peace of Colorado, it was improperly admitted

to record, and hence that the registration did not operate as constructive notice. There was no evidence of actual notice. But by statute in Colorado it is provided that "No mortgage on personal property shall be valid as against the rights and interests of any third person or persons unless possession of such personal property shall be delivered to and remain with the mortgagee, or the said mortgage be acknowledged and recorded."

Gen. Stat. Colo. 1883, sec. 163.

In Colorado, as in Arkansas, when the defect in the statute was discovered it was amended.

Id., sec. 164.

De Courcey *v.* Collins, 21 N. J. Eq., 359., is nowise in point. The statute in that case provided where a mortgage executed by a nonresident should be recorded, and there was no evidence of actual notice.

In Smith *v.* Moore, 11 N. H., 63, the statute as to nondelivery was similar to that of Colorado; so stated in the opinion; and there was evidence of non-delivery. In Bither *v.* Buswell, 51 Me., 601, the statute required the mortgage to be registered in the county in which the mortgagor resided; it was not shown where he resided; and there was no evidence of actual notice. Briggs *v.* Leitelt, 51 Mich., 79 was a similar case.

In none of these cases, except in the Colorado case, was there a failure to denote a place for the registration of mortgages executed by nonresidents; and the decision in Colorado too went off on a statute for which in Arkansas there is no equivalent, or on the ground that there was no actual notice.

In Arkansas nondelivery of property mortgaged never raised even a *prima facie* presumption of fraud.

In the very nature of things it would seem that one who could not record his mortgage because the law would not allow him to

do so, could not be convicted of fraud by the law for not recording it. The contrary proposition would seem to be the height of absurdity.

St. Paul said, "Where there is no law there is no transgression —*ubi enim non est lex, nec praevaricatio.*" Ep. ad Rom., IV-15. Doubtless Gamaliel knew that. Did not this court in Conard *v.* Atl. Ins. Co., 1 Pet., 386, say that one was not required to deliver a ship which was off at sea? If the law does not require one to perform impossibilities, it should not punish him for not having performed them.

Indeed the judge who delivered the dissenting opinion in the court below quotes from the opinion in Calder *v.* Bull, 3 Dallas, 388, "A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law," "is manifestly unjust."

A great jurist on a memorable occasion said: "Where there is no law applicable there can be no judgment; where there is no judgment, there can be no condemnation."

But the decision in Watson *v.* Thompson Lumber Company concerns us but little. It did not join in the stately procession of the Arkansas statutes into the Indian Territory. *It was not based on any statute; but on the absence of a statute.*

XII.

In Arkansas in case of a sale of personal property its non-delivery to the buyer does not raise a conclusive presumption of fraud.

The statutes of the different States are extremely diverse. In some of them various periods of time are allowed for registering conveyances. In some a failure to register or deliver possession avoids, while in some States registration does not dispense with delivery. Under some of these statutes actual notice counts for nothing. Where non-delivery is conclusive evidence of fraud, and registration is also required, and there is no registration, or a defective registration, then if there is no delivery, the conveyance is void, notice or no notice.

It is well known that this doctrine as to the legal presumption of fraud *in case of a sale* based on mere non-delivery of the thing sold, once prevailing extensively in this country, and still extant in some of the States, was based on a mistaken reading of the opinion of Buller, J., in Edwards *v.* Harben, 2 Term, 587, by American courts.

Notes to Twyne's Case, 1 Smith's L. C., 33.

Benj. Sales, Bennett's Ed., secs. 485, 489.

Bump Fraud. Conv., p. 61.

It is well settled in Arkansas that non-delivery of the thing sold does not raise a legal presumption of fraud; but that it is only a circumstance that may be explained either way.

Field *v.* Simco, 7 Ark., 269.

Cocke *v.* Chapman, id., 197.

Adler-Goldman Co. *v.* Phillips, 63 id., 51.

Valley Distilling Co. *v.* Atkins, 50 id., 291.

Hempstead *v.* Johnson, 18 id., 134.

In Martin *v.* Ogden, 41 Ark., 192, the court said:

"The more modern and better doctrine is that this is a presumption of fact, and that no conclusive legal presumption arises from

the fact that the vendor remained in possession; and that even such a presumption of fact does not necessarily arise where the possession accompanies or follows the deed, or where there is a mere mortgage. It is a question for a jury, or, in equity, for the chancellor, under all the circumstances."

The decision in Huntley *v.* Kingman, 152 U. S., 527, and cases cited in the opinion, render further argument superfluous. Indeed, the whole matter, as far as the federal courts are concerned, was settled in Warner *v.* Norton, 20 How., 459, and in Smith *v.* Craft, 123 U. S., 436.

XIII.

The failure to deliver the mortgaged property to the mortgagee did not avoid the mortgage by any rule of the common law.

The English cases on this subject are very fully and carefully collated in Bump on Fraudulent Conveyances, page 61 *et seq.* The only deficiency or defect that we have found in this review is that in speaking of Ryall *v.* Rolle, 1 Atk., 165, the author fails to state that the decision was based on the statute of 21 James I., c. 19, which was a bankrupt law; and not on the common law, or the statutes of Elizabeth, sometimes said to be declarations of the common law.

This statute was never in force in Arkansas.

Mansfield's Dig., sec. 566.

It is certainly a well known fact that at common law non-delivery of property mortgaged to the mortgagee did not raise even a *prima facie* presumption of fraud. It was not a badge or indication of fraud; and of itself was wholly without significance.

In Edwards *v.* Harben, Buller, J., said:

"But if the conveyance be conditional, there the vendor's con-

tinuing in possession does not avoid it; because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition."

2 Term., 595.

1 Powell Mortg., 33 a.

Under the local law the mortgagee is not entitled to possession until breach of condition.

Fitzgerald *v.* Beebe, 7 Ark., 319.

Ringo *v.* Woodruff, 43 id., 489.

The decisions on this subject so far as they relate to non-delivery of property mortgaged to secure future payment are entirely harmonious. Mr. J. Story, in Conard *v.* Ins. Co., 1 Pet., 449, said:

"But in cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulation of the parties, * * * has never been *per se* a badge of fraud. The books are full of cases on this subject."

The same judge in Meeker *v.* Wilson, 1 Gall., 419, said: "An exception to the rule is where the possession of the grantor is consistent with the deed."

So in Phettiplace *v.* Sayles, 4 Mason, 312, Mr. J. Story said:

"The possession therefore must be inconsistent with the sale, and repugnant to its terms or operation, before it raises a presumption of fraud."

In Fowler *v.* Merrill, 11 How., 394, the court say that "it is more customary in all mortgages for the mortgagor honestly to retain the possession than to pass it to the mortgagee. And in conditional sales, especially on a condition precedent *bona fide*, the vendor, it is usually considered, ought not to part with the possession till the condition is fulfilled."

In U. S. *v.* Hooe, 3 Cranch, 89, C. J. Marshall said:

"But the difference is a marked one between a conveyance which

purports to be absolute, and a conveyance which, from its terms, is to leave the possession in the vendor. *If, in the latter case, the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor until the creditor becomes entitled to his money, and either chooses or is compelled to exert his right.* That the grantor is to receive the rents and profits till the grantee shall become entitled to demand the money which the deed is intended to secure, is a usual covenant."

In Hamilton *v.* Russell, 1 Cranch, 316, C. J. Marshall said:

"The distinction they (the cases) have taken is between a deed purporting on the face of it to be absolute, so that the separation of the possession from the title is not incompatible with the deed itself, and a deed made upon condition which does not entitle the vendor (vendee) to immediate possession."

In Hempstead *v.* Johnson, 18 Ark., 134, the court said:

"This court has adopted the rule that possession by the vendor subsequent to the sale does not amount to fraud *per se*, but is merely *prima facie* evidence of fraud, subject to be explained. But this rule does not apply to mortgages and deeds of trust where the grantor by the terms of the deed is permitted to retain possession of the property until default of payment, because in such transfers the possession is consistent with the deed, and furnishes no evidence of fraud. * * * It would seem from these authorities that if the time fixed for payment and sale upon default be reasonable under all the circumstances, fraud is not to be inferred."

So far as we know there is no conflict among the cases on this subject.

Jones, Chat. Mortg., sec. 323.

There are, however, statutes in two or three States changing the law in this respect.

Of course cases where mortgaged property is left with the mort-

gagor with permission to use, sell and re-invest, and cases of secret trusts, as in Lukens *v.* Aird, 6 Wall., 78, and other cases of that sort are different.

It was never held in Arkansas that in any case it must be shown that possession was delivered to the mortgagee. That doctrine, once prevailing in New York, and there found to be utterly oppressive and unjust (see opinion of Dickinson in Stoddard *v.* Butler, 20 Wend., 544, and Bump Fraud. Conv., ch. V, p. 61), was entirely repudiated in Arkansas. What the supreme court of that State hold is that possession by the mortgagee is constructive notice to creditors and purchasers; not that it is fraud not to take possession.

XIV.

The decision in Main v. Alexander ought not to be imposed on the people of the Indian Territory, because:

It is manifestly wrong in principle, and is in violation of the statute. Unjust decisions have no doubt often been made; but it is not often that parallel rulings by the same court, running over a long series of years, in which one denounces as wrong what the other solemnly declares to be right, can be found.

From the regrets that have been expressed it is clear that if the Supreme Court of Arkansas were now to pass on the question as *res nova* the decision would be different.

The conclusion in Main *v.* Alexander was reached by the twofold process of putting a wrong construction on one section of an act, and overlooking another section of the same statute, which by unmistakable language was decisive of the controversy. A very technical construction was placed on the only section considered.

Almost all of the cases decided in accordance with the ruling in Main *v.* Alexander—and that case as well—have been cases where

the mortgagee was not morally at fault; where some officer had blundered in writing a certificate which rendered the registration ineffectual; and where some one was willing to obtain advantage of a technical defect in a manner proclaimed in Byers *v.* Engles and the long line of cases based on it to be iniquitous and unjust. It has long been the settled law that statutes intended to prevent fraud shall never be used as instruments for the perpetration of fraud. This is known to the legislatures in England and America; and in no case, so far as we have learned, has the rule ever been assailed or restricted by the legislative power. It was well said in Byers *v.* Engles, p. 550, "and so permanently has this construction been settled * * * that to change the construction given by the courts would, in effect, be changing the law itself."

Within our own time by radical change in civil procedure the theory that all laws and rules must be literally and technically construed has been banished from its most ancient fortifications and stronghold. The truth is that the doctrine of strict construction has never been applied, and can never be applied consistently.

Doles *v.* Hilton, 48 Ark., 305.

As we have seen, the Arkansas court has made many exceptions from the doctrine announced in Main *v.* Alexander. Nevertheless it has immolated the rights of a considerable number of men and women that ought to have been considered as sacred when judged by the very standard of good faith which it had made, and has perpetuated down to this hour. These victims were thus punished "not for any good or harm that they had done;" but on grounds of public policy. We suppose that the custom of human sacrifices was ordained and continued for the same reason. And by the same reasoning it ought never to have been abolished; but ought carefully to be transplanted to all new colonies.

No man can serve two masters; and the court cannot consistently

adopt both Byers *v* Engles and Main *v.* Alexander. They are as opposite as the poles. Nor should the court, under the rule above referred to, inflict on the Indian Territory a doctrine that has been tried in Arkansas, and has been discredited by the court in which it had its origin. We have read that traders among the Indians—and even sometimes Indian agents—have been known to sell shoddy goods to them, on the principle that "anything is good enough for the Indians;" but perhaps they would have hesitated to impose on them for a perpetual inheritance the mutilated remnant that is now left of Main *v.* Alexander.

There is not only an inconsistency in holding that in the case of deeds actual notice is equivalent to registry, and that this rule does not apply to mortgages, but also in saying that in case of mortgages possession, which is merely construçtive notice, a mere inference, in its nature fallible, is sufficient, while the undisputed fact of notice is not sufficient, except in the case of mere volunteers. The object of the registration acts is publicity; and any one who admits full notice cannot complain of want of publicity. Taken as a whole the decisions are neither harmonious nor satisfactory. The game is so muddled that we must begin again. It is the *statutes* that are adopted for the Indian Territory; and the decisions are quite subordinate.

We all know whence the decision in Main *v.* Alexander was imported. It is a part of the scoria of an extinct volcano in New York now happily extinct. It was there held that non-delivery of personal property sold raised a *conclusive* presumption of fraud. No evidence was admissible to show the real facts; although the courts were continually proclaiming that fraud would NEVER be presumed, but must be satisfactorily proved. No such doctrine of *conclusive* presumption could be traced to English law of any period, or to any other code of laws; but it was long defended with a zeal that truth rarely enlists.

In the first half of the nineteenth century the courts of New

York exercised a preponderating influence over the jurisprudence of the States of the South and West. When this question was presented judges dropped a citation of a New York case, and passed on. Nothing is so attractive as a paradox which saves all the trouble of thinking. If it had not been for the stand taken by this court the rule would probably have swept the whole country.

In a few of the States fanatical lawyers, possessed of more zeal than discretion, secured the passage of acts along the same line, but still more atrocious. We say lawyers, because it is not probable that the average layman would know anything about such an artificial and technical rule; and fishes do not make nets.

What is noteworthy about the ruling in Main *v.* Alexander and other cases of that sort, is the subordination of the innocent purchaser to the creditor. Compared with the creditor the innocent purchaser was *persona non grata.* He was assigned a position below the salt; a poor man at a frolic, made to feel his inferiority, the butt of insolent jests, and in the end stripped of his clothing, and turned out into the streets to taste the aroma of the wintry blasts, his virtues weighing nothing against his poverty; condemned on a single fact, and unheard.

The debtor was placed in a sort of legal *reconcentrado* where a different code of laws, having no existence for others, was applied. What in others was lawful and even praiseworthy, was in him a crime; and it was dangerous to have any dealings with him.

In Doane *v.* Eddy, 16 Wend., 523, an itinerant minister of the gospel had become indebted to the extent of $175, for which he gave a bond with a surety, executing to the latter a mortgage on a mare, with an agreement that he should have the use of the mare until default, so that he could continue to prosecute his calling. The debt had most likely been incurred by the preacher to keep soul and body together, or to keep his family from starving. Anyway by pursuit

of an unremunerative profession he had become completely demonetised. The agreement for retention of possession was not secret. A creditor to whom the minister owed $36.75, *with full knowledge of all of the facts,* attached the mare; and it was held by a majority of the court that the mortgage was a damnable fraud that must be stamped out; a sufficient admonition as to the wickedness of trying to reform this evil world on a small capital. The minister thus denounced as a fraud might have remembered that many pure minded and good men had taken on themselves vows of poverty; and he must have read over somewhat ruefully the parting injunction to his predecessors to put neither silver nor brass in their purses. But the majority of the court evidently concluded with John P. Robinson that "they didn't know everythin' down in Judee;" and, having squelched this impecunious preacher and his benighted friend and accomplice under the planetary weight of the law, the judges slept soundly, lulled to their slumbers with the consciousness of duty performed. It is gratifying to know that C. J. Nelson dissented.

It was a fraud in the mortgagor to keep temporary possession under any circumstances whatever; though by the terms of the statute quoted in the opinion of the majority in Doane *v.* Eddy the persons claiming under the conveyance might show that "the same was made in good faith, and without any intent to defraud creditors;" and notwithstanding the fact that without any special agreement this forlorn itinerant was by law entitled to the possession of his mare until condition broken.

Waring *v.* Smith, 2 Barb. Chy., 119.

No more desolating rule was ever invented. It debauched the creditor by requiring him to act the part of a Shylock, and to steel his heart against the pleadings of innocence and poverty; rewarded him by confiscating the property of inoffensive third persons, and by

condemning them unheard. No cast-iron rule was ever enforced with such unrelenting severity.

It was even insisted that it ought to be enforced where delivery was impossible.

Butler *v.* Van Wyck, 1 Hill, 456.

It was in truth one of the most terrible proofs of the delirium which a desire to defend the rights of property has ever introduced into the law. It is hardly possible to imagine a more palpable effect of that materialistic reasoning which considers individual men solely in reference to their utility to creditors. The courts established a sort of inverted civil service rule to reward scoundrels, who, prying into records in order to discover latent defects, were always prowling around seeking to rob of his property someone who owed him nothing, and who in the honesty of his heart supposed that an act of kindness and charity was not a crime, since it could harm no one; or who was the made victim of casual omissions which had occasioned no loss or detriment to his greedy and vindictive pursuer. Under pretence of suppressing frauds the courts rewarded them; treating the attaching creditor as an accomplice turned State's evidence; and as a generous recompense for his compunction and fidelity to dishonest principles they bestowed on him all of the property in controversy, gave him absolution and applause, and thrust his adversary out of court with anathemas and condemnation.

History tells us that when the King of France, during the dark days of religious fanaticism, sent soldiers out to destroy certain villages inhabited by heretics, their commander asked a certain ecclesiastic how he could distinguish heretics from the orthodox, when the latter said: "Kill them all; God will know his own!"

The story is probably not true. But whenever the courts concoct a rule that arbitrarily shuts off inquiry, and must often sacrifice the

innocent, they act on the principle thus indicated, minus the trust in God.

It made no difference that the rule was constantly working the most outrageous injustice by shutting off the light. Criticism provoked resentment and dogmatism until the courts seemed to regard it as clothed with the highest sanctions of religion, adhering to their nostrum with grim tenacity, though justice was generally immolated.

On this subject Senator Daniel S. Dickinson in Stoddard *v.* Butler, 20 Wend. 545, said:

"Neither the legal nor the moral code should be administered for the sole benefit of creditors. They become creditors by their own volition, and have abundant means for their own protection; nor can I consent to place the general creditor upon a superior footing to him who furnishes his poor neighbor with a cow to nourish his children, or a team to sow his crops or gather in his harvest. If the commercial interests of this country cannot be sustained without trampling upon all others, and the ordinary charities of life besides, the sooner it finds its level the better. It is an ideal dream to suppose we can advance the cause of morals by establishing a rule which ministers to the mercenary passions at the expense of the benevolent affections, or that the fountain of justice will send forth purer streams if they are forced to flow through artificial channels. * * * *

"In *Randall v. Cook,* Mr. Justice Bronson says, 'Had it been declared fifty years ago, that if a man conveyed his personal chattels and still kept them himself under any pretence whatever, the transaction should be deemed absolutely fraudulent and void as against creditors and purchasers, it would have saved an incalculable amount of time and money which have been expended in the litigation of questions of this kind; and it would moreover have rendered a most important service to the cause of good morals, by removing all tempta-

tion to the numberless frauds which have been committed for the purpose of placing property beyond the reach of legal process.' While I acknowledge the force of reasoning adopted by the learned and esteemed judge, I am compelled to remark that if at the same time the law had laid its interdiction upon all human intercourse as to exchange or purchases of property the same result would have been produced, and with about equal justice and propriety. If fifty years ago the law had laid aside its metaphysical subtleties, and revealed itself in its own simplicity and purity—if it had, regardless of form, pronounced appropriate judgments upon honesty and fraud, it would have won more by its justice than it has terrified by its power. There cannot be two standards of truth and morals—the one for the courts of justice and another for the people in their ordinary intercourse. If by the inquisitions of the judicial crucible, a transaction both honest and fair may be alloyed until it is dishonest and fraudulent, by the inverse power of transmutation a fraud may be refined until it is equivalent to honesty and truth. If truth may become constructive falsehood, by the same rule falsehood may become constructive truth. If the *possession* of personal chattels is, or ought to be *conclusive* evidence of ownership, it is also, or ought to be *conclusive* evidence that a person *not in possession* is *not the owner*. All, then, that remains for the fraudulent debtor to do, who would *conclusively* place his chattels beyond the reach of execution, is to place them in the *possession* of his friend against whom no process has been issued, and it is done.

"It was said by counsel upon the argument of this case that the rule contended for by the appellants would tend to produce and encourage litigation and multiply suits, and for this reason should be upheld by the legal profession; that its adoption would tend to to make expense and delay in the collection of debts, while the reverse would be productive of much utility and economy. It may be

said with equal propriety that if our system of jurisprudence was exchanged for the arbitrary laws of the East; if our courts and juries were dispensed with, and justice measured out by the nod of the lawgiver, and executed by the baston and bowstring, our administration of justice would be more summary as well as more economical, and the service of the legal profession might be altogether dispensed with."

It is well known that Judge Bronson took offense at this language; and without reason; for whenever the time comes that any principle of law is not the subject of legitimate criticism then we shall have reached that last state of decrepitude and stagnation towards which, according to some thinkers, we are inevitably tending, and which we shall attain when we shall have exhausted all possible combinations.

No doubt Judge Bronson was a very able and a very honorable judge; but neither genius, talents, learning, virtue and the best intentions, or all of them together, can protect the human mind from the most deplorable errors. The feebleness of his rejoinder in Butler v. Van Wyck, 1 Hill, 450, betrayed the weakness of his cause. He disposed of the objections made by Dickinson by calling them "witty comments." There it was again; ending controversy by calling things by wrong names!

There is another New York case that deserves honorable mention. A man lent a carriage to a debtor, and it was attached by a creditor, contending that the bailment was in law necessarily a fraud. The lawyer who started this contention was a better logician than Aristotle. If it was a fraud under any and all conceivable circumstances for one who had bought chattels from a debtor to leave him temporarily in possession, thus giving him a false show of credit, it must be equally fraudulent to lend him chattels whose possession would have precisely the same effect. The court, however, escaped

from the Caudine Forks by saying *"Distinguo,"* and that the bankrupt act of Jac. I, c. 19, did not quite reach the case.

Craig *v.* Ward, 9 Johns., 197.

The legislature cannot deprive anyone his property simply by calling things by wrong names. It may tax privileges; but it cannot say that it is a privilege for a man to eat his dinner, and then tax him for that. It cannot, under any pretence, take away the property of A and give it to B. How then can the courts do the same identical thing by calling that a fraud which everyone knows is not a fraud? Men whose thoughts are completely polarized by passing through a technical and highly artificial medium may revel in a world of phantoms of their own creation; but the cause of justice should not be allowed to suffer thereby.

The court in Main *v.* Alexander, seeing that the courts of New York, presided over by judges eminent for learning and ability, had found an easy rule of the thumb for deciding cases without inquiring into the facts, simply followed their illustrious example, only applying it to registration, and not to possession.

We have said that Byers *v.* Engles overruled Main *v.* Alexander. It was again overruled when the same court said that non-delivery did not raise a conclusive presumption of fraud. It was again overruled when the court held that the rule had no application to mere volunteers; and that an attachment or execution creditor even after sale was only a volunteer, not being an innocent purchaser.

It was overruled again when the court held in Excelsior Mfg. Co. *v.* Owens, 58 Ark., 556, that of two opposing presumptions that of innocence would prevail.

It was again overruled when the court declared repeatedly that fraud is *never* presumed. We do not say that the decisions are uniform. What we do say is that the decision in Main *v.* Alexander is harsh, unjust, oppressive and unreasonable; based on no sound prin-

ciple; that it has been so declared repeatedly by the court that made it; and that it is not worthy of perpetuation even for the government of Indians not taxed.

We say that our system of laws rests on a natural sense of justice more or less recognized by all men; and that it is the highest duty of all of the departments of the government to see that these two do not part company. When men substitute names for things, words for thoughts, and counters for words, the connection dissappears; and gross injustice is the result.

We can imagine a refined, cultivated and upright man, utterly ignorant of courts and of legal procedure, who, finding himself in a courtroom for the first time, might there listen to a litigant saying to learned judges, "The question turns on my knowledge of a certain fact at a certain time. Now I knew that fact as well as I could know anything; but I did not acquire my knowledge in a specially orthodox fashion sanctified by legal rules; so although I knew the fact, still I didn't know it, don't you see?" If such a listener should then hear the judges declare that this litigant had become the owner of a large estate which had previously belonged to another, and for which he had paid nothing, all upon this hair-splitting theory, he would probably fancy that he was either in Bedlam, or that he was listening to the recital of a comedy. If he should then hear the same judges declare that a man should lose a large estate because he had not registered a written instrument which the law did not permit to be registered, he would probably conclude that he was losing his senses; and if he should then go out and hang himself in despair, an intelligent jury would certainly bring in a verdict of justifiable suicide.

XV.

The curative act of Congress made the mortgages as valid as against attaching creditors with notice as if they had been duly and legally registered at the time they were actually filed.

1. It cannot be doubted that the act was intended to operate retrospectively, for after stating where mortgages shall thereafter be recorded (*ante*, p. ....) it proceeds as follows:

"All mortgages of personal property in the Indian Territory *heretofore* executed and recorded in the judicial district thereof in which the property was situated at the time they were executed *are hereby validated.*"

The use of the word "heretofore" in the statute removes all possible doubt. It was contended in People *v.* Crennan, 141 N. Y., 239, 36 N. E., 187, that the statute was not retrospective; but the court said, in speaking of the many authorities cited for the rule above mentioned:

"But these authorities, and the rule they establish, have no application; because here the legislative intent is plainly manifested that this section shall have retroactive operation. To hold otherwise we would have to eliminate the word 'heretofore,' which is used in contrast with the word 'hereafter' from the section."

To the same effect:

People *v.* Spicer, 99 N. Y., 233.

Retrospective laws, like other remedial statutes, should be construed liberally.

Wilkinson *v.* Leland, 2 Pet., 627.

Larkin *v.* Saffarans, 15 Fed., 150.

However, if the statute had not been retroactive the effect would have been the same. As the deed had been recorded before

the act was passed, the record became effectual from the passage of the act, and a second filing and recording was not required.

Fowler *v.* Merrill, 11 How., 375.

2. The power of Congress over the territories is plenary. This question has of late assumed very great importance; but, as it has recently been argued before the court, no doubt in all of its phases, we shall not dwell upon it.

It is a familiar historical fact that the first ten amendments to the Federal constitution were proposed by a number of the State conventions at the time of their adoption of that instrument, the object being to curb the power of the Federal government in its operation upon the States and their citizens. Nothing seems to have been said or thought of the territories.

In Mormon Church *v.* U. S., 136 U. S., 42, the court said: "The power of Congress over the territories in general are plenary." In National Bank *v.* County of Yankton, 101 U. S., 133, the court said that Congress was in respect of the territories supreme.

It also said: "Congress may not only abrogate laws of the territorial legislatures; but it may itself legislate directly for the local government. *It may make a void act of the territorial legislature valid, and a valid act void.*" In that case an act of Congress most materially altered a contract which had been made by a territorial legislature with a railway company. The court said that Congress might legislate for the territories "as a State does for its municipal organizations." The extent of the power over such corporations is defined in Laramie County *v.* Albany County, 92 U. S., 310.

See also as to the power of Congress over the territories

Benner *v.* Porter, 9 How., 242.

McAllister *v.* U. S., 141 U. S., 184.

Shirley *v.* Bowlby, 152 id., 48.

Koenigsberger *v.* Richmond Silver Mining Co., 158 U. S., 48.

Am. Ins. Co. *v.* Ganter, 1 Pet., 542.

Rogers *v.* Burlington, 3 Wall., 663.

Good *v.* Martin, 95 U. S., 90.

Clinton *v.* Engelbrecht, 13 Wall., 434.

Reynolds *v.* U. S., 98 U. S., 115.

Hornbuckle *v.* Toombs, 18 Wall., 645.

2 Story Const., secs. 1324, 1325.

The control of Congress over the Indian tribes has always been regarded as unlimited.

U. S. *v.* Kagama, 118 U. S., 380.

The act of Congress extending the constitution and Federal laws over the Indian Territory (*ante,* p. 3) was subject to repeal, and could not prevent a subsequent Congress from passing the curative act in question.

Cooley Const. Lim., 146.

District of Columbia *v.* Hutton, 143 U. S., 18.

3. The curative act applies to pending suits.

U. S. *v.* Peggy, 1 Cranch, 103.

Sidway *v.* Lawson, 58 Ark., 122, overruling Wright *v.* Graham, 42 id., 140.

Pelt *v.* Payne (Ark.), 30 S. W., 426 (1895).

Cooley Const. Lim., p. 469.

Johnson *v.* Richardson, 44 Ark., 372 (1884).

Reid *v.* Hart, 45 id., 50 (1885).

In re Hull, 167 U. S., 38.

Tennessee *v.* Sneed, 96 id., 69.

Perriman's Case, 103 id., 720.

Cooley Const. Lim., 442.

1 Kent Comm., 455.

4. Irrespective of the question presented above as to the unlimited power of Congress over the territories, and over the Indian

tribes, the power of Congress to pass the curative act in question is beyond doubt.

There is no inhibition in the Federal constitution on the power of Congress to pass retrospective laws.

Curtis *v.* Whitney, 13 Wall., 70.

There is such an inhibition against legislation in some of the State constitutions which works at times great injustice. There is a provision in the constitution of Tennessee that "no restrospective law or law impairing the obligation of contracts shall be made;" and yet it is construed to apply only to the impairment of contracts, and as not prohibitory of the large class of acts affecting remedies, remitting penalties, and so on. "In short" the court said, "So many are the past transactions upon which the public good requires posterior legislation that no government can preserve order, suppress wrong, and promote the public welfare without the power to make retrospective laws."

Townsend *v.* Townsend, Peck. R., 117.

Larkin *v.* Saffarans, 15 Fed., 147.

5. The attaching creditors have acquired no such rights as prevent the operation of the curative statute in this instance.

It is contended for the plaintiff in error that by paying a clerk a dollar for a writ of attachment, and paying a marshal a small sum for making a levy by copying a description of a lot of cattle from a public record, the plaintiffs below acquired a *vested right* to take from the pocket of a third person with whom they had no contractual relation, and who had never done them any harm, the sum of nearly $56,000; and that that sacrifice is so essential to justice that it is included in the same constitutional guaranty that protects our liberty and our lives, something sacred and inviolable, beyond the reach of human power. We do not think so. Any right, however ephemeral or precarious, may be properly spoken of as vested as long as it lasts.

The fifth amendment uses the word "property;" and if we can only stick to the text we shall have no difficulty.

An attaching creditor has no *property* in the thing attached; hence his lien does not give him a right to sue for an injury to it.

Ladd *v.* North, 2 Mass., 514.
Bigelow *v.* Wilson, 1 Pick., 492.
Dobbins *v.* Hanchett, 20 Ill. App., 396.
Davidson *v.* Beatty, 3 Har. & McH., 594.
Owings *v.* Norwood, 2 Har. & J., 96.
Millar *v.* Babcock, 25 Mich., 137.
Goddard *v.* Perkins, 9 N. H., 488.
Snell *v.* Allen, 1 Swan, 208.

"The laying of an attachment does not change the title to the property attached. The right of property remains in the defendant, subject to the lien of the attachment."

Starr *v.* Moore, 3 McLean, 354.

The quality of an attachment lien in this case will, we should think, depend on the statute under which the writ was issued, connected with the judicial construction placed upon it by the Supreme Court of Arkansas before the importation of the statutes into the Indian Territory. The decisions of that court are perfectly explicit.

It is true that in Harrison *v.* Trader, 29 Ark., 92 (1874), the special judge who delivered the opinion likened an attachment lien to liens created by contract; but what he said in this respect had no possible relation to the questions before the court; and he expressly qualified his statement by saying that he did not intend that it should apply wherever the rights of third persons intervened. Since that time the same court has overruled that *dictum*.

"This lien is allowed for no purpose except that for which the attachment is allowed. It creates no estate in the property attached,

nor divests prior rights or equities therein. It is neither a *jus ad rem* nor a *jus in re.*"

Tennant *v.* Watson, 58 Ark., 255 (1893).

"An attachment has no bearing on the merits of a suit. It is only ancillary to secure the fruits of any judgment to be obtained. It brings under control of the court—not of the plaintiff—property to be held for the purpose. The ownership is not changed. The plaintiff has no right to it in any case as property; and to remove and sell it, with or without the consent of the sheriff, is a contempt of court."

Atkins *v.* Swope, 38 id., 536 (1882).

This is in accordance with the doctrine prevailing everywhere.

2 Sto. Eq., sec. 1215.

Pratt *v.* Law, 9 Cranch, 497.

The question as to the power of the legislature to pass a curative act which will destroy an attachment lien has been thoroughly considered by the Supreme Court of Arkansas, and has been settled as far as that court could settle it.

In Green *v.* Abraham, 43 Ark., 420 (1884), a deed of trust—which is the same thing as a mortgage under the registry laws—(Cross *v.* Fomby, 54 Ark., 179) was acknowledged before a person not authorized to take it; and the property mortgaged was afterwards levied on under execution. Still later an act was passed curing the defective acknowledgment. In a contest between the execution creditor and the mortgagee it was held that, as there was no clause in the State constitution forbidding retrospective legislation, the mortgagee had a right superior to that of the execution creditor. The court said:

"A purchaser from McReynolds (the mortgagor) of this crop between the recording of the trust deed and the passage of the law, could not be deprived of his property by an act which restrospectively

deprived Reynolds of the title he had when the purchase was made. But the constable, levying his execution upon the corn as the property of McReynolds, is not a purchaser. He has indeed succeeded to the rights of McReynolds, so far as this action is concerned; but his equities are no greater than those of McReynolds. *And neither he nor McReynolds, can have a vested right to a defense based upon an informality which does not affect his substantial equities.*"

Of course the mortgage, though unrecorded, was good as between the immediate parties to it.

Jacoway *v.* Gault, 20 Ark., 193.

The case of Green *v.* Abraham has recently been affirmed by the same court in Steers *v.* Kinsey, 58 S. W., 1050.

In that case a mortgage was executed and registered; but as the certificate of acknowledgment was defective, the registration was invalid. The lands mortgaged were attached in suits against the mortgagor; the attachments were sustained, judgments were rendered in favor of the attaching creditors; and the lands were sold to the plaintiffs in the attachments. After the attachments were levied a curative act passed. The court held that it cured the defective acknowledgment, and rendered the mortgage superior to the attachments, saying:

"The statute cured defects in the acknowledgment to the mortgage, and gave it, except as to persons having acquired vested rights in the land before the passage of the acts, the same force and effect it would have had had it been properly acknowledged in the first instance. The only question that remains, then, is whether the parties who brought the attachment suits acquired vested rights in the land by the bringing of the suits and the levy upon the lands. Now, a vested right 'must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, to the present or future enjoy-

ment of property,' in some way or another. Black, Const., 430; Suth. St. Const., 164. But parties have no vested rights in remedies or matters of procedure; and we see nothing in these attachment proceedings that constituted a vested right on the part of the plaintiffs therein to the property attached. The attachments were levied upon the land after the mortgage under which the Arkansas City Improvement Company holds had been executed and recorded, and we think that it was within the power of the legislature to give to such mortgage the effect intended by the parties thereto by curing the formal defect in the acknowledgment."

These views we believe are in strict accord with those often announced by this court, and with the general current of decisions throughout the country.

"The contracts designed to be protected by the Federal constitution 'are contracts by which *perfect rights*, certain *definite fixed private rights of property* are vested.'"

Butler *v.* Pennsylvania, 10 How., 416.

"To constitute a violation of the provision against depriving any person of his property without due process of law, it should appear that such person *has a property* in the particular thing of which he is alleged to have been deprived."

New Orleans *v.* N. O. Water Works Co., 142 U. S., 88.

In Campbell *v.* Holt, 115 U. S., 620, it is held that though an action on a debt has been barred by limitation, yet if the legislature repeals the statute of limitations the debt is revived. The following language seems to be conclusive:

"It is to be observed that the word vested right is nowhere used in the constitution; neither in the original instrument, nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments; but when we get beyond this, although vested rights

may exist, *they are better described by some more exact term,* as the phrase is not one found in the language of the constitution. We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case."

In speaking of curative statutes this court has said:

"To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. *Consent to remedy the wrong is to be presumed.*"

Randall *v.* Krieger, 23 Wall., 149.

This has often been repeated.

"When vested rights are spoken of by the courts as being guarded against legislative interference they mean those rights to which a party may adhere, and upon which he may insist without violating any principles of sound morality. * * * In the nature of things there can be no vested right to violate a moral duty, or to resist the performance of a moral obligation."

Banger *v.* Nelson, 9 Gill, 309.

"Courts do not regard rights as vested contrary to the equity and justice of the case."

Goshorn *v.* Purcell, 11 Ohio St., 652.

Though a contract inhibited by law is void, yet it may be rendered valid by a repeal of the law.

Little Rock *v.* Merchants' National Bank, 98 U. S., 314.

No creditor has a vested right in any particular remedy.

St. Louis R. *v.* Alexander, 49 Ark., 190.

Porter *v.* Doe, 10 id., 187.

Files *v.* Fuller, 44 id., 281.

South Carolina *v.* Guillard, 101 U. S., 433.

Memphis *v.* U. S., id., 293.

Webster *v.* Cooper, 14 How., 488.

In speaking on this subject the court, in Antonie *v.* Greenhow, 107 U. S., 769, say:

"In all such cases the question becomes therefore one of reasonableness; and of that the legislature is primarily the judge. We ought never to overrule the decision of the legislative department of the government unless a palpable error has been committed. If a state of facts could exist that would justify the change in the remedy which has been made we must presume it did exist; and that the law was passed on that account. We have nothing to do with the motives of the legislature if what they do is within the scope of their powers under the constitution."

Mr. Cooley says:

"If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute."

Const. Lim., p. 457.

Green *v.* Abraham, 43 Ark., 423.

Could not Congress in the first instance have provided that actual notice of a mortgage should be equivalent to registration? No one can doubt that.

In Conkey *v.* Hart, 14 N. Y., 28, a lease provided that in case of default in payment of rent the landlord might distrain for it. The law at the date of the lease gave the right to distrain; but the legislature repealed the law. It was held that this was a matter pertaining to the remedy, in respect of which the power of the legislature could not be controlled by contract; and that the right of distraint was gone.

Though one may by existing law be entitled to a mechanic's lien it may be divested by a repealing statute.

"The lien is bestowed, not to create a debt or charge, but to create

a remedy—a means to collect a debt. This remedy that the legislature has created in derogation of the common law it can take away; and no one can have a vested right to any particular remedy."

Haynes *v.* Wady, 73 Mich., 178, 41 N. W., 222.

Bangor *v.* Goding, 35 Me., 73; 56 Am. Dec., 688.

A statute may take away an existing right to an appeal.

McCardle *ex parte*, 7 Wall., 506.

R. Co. *v.* Grant, 98 U. S., 398.

Norris *v.* Crocker, 13 How., 438.

Sherman *v.* Grinnell, 123 U. S., 679.

Gurney *v.* Patrick Co., 137 id., 141.

Morey *v.* Lockhart, 123 id., 56.

Nat. Bank *v.* Peters, 144 id., 570.

Hornthal *v.* Collector, 9 Wall., 560.

Assessor *v.* Osborne, id., 567.

"Actions are always brought in view of the known power of the legislature to change or modify rules of procedure at pleasure; and a litigant cannot consistently claim that, because the legislature takes away some privilege which was accorded to litigants when the suit was instituted, he is thereby deprived of a vested right."

Campbell *v.* Silver Mining Co., 27 C. C. A., 646; 83 Fed., 643, Eighth Circuit.

Where a court has transcended its jurisdiction, and its judgment is void, the legislature may validate it.

Mechanics' Bank *v.* Union Bank, 22 Wall., 298.

In Wilkinson *v.* Leland, 2 Pet., 627, lands lying in Rhode Island were sold under an order of a probate court in New Hampshire. This court said: "The sale made by the executrix in virtue of the said license was utterly void; and the deed given thereupon was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. It was a mere nullity."

But as the legislature of Rhode Island had passed an act confirming the sale, the court held it valid.

In Curtis *v.* Whitney, 13 Wall., 70, it appeared that defendant had bought lands at a tax sale under a statute that gave her the absolute right to a deed at the end of three years. Then the legislature passed an act providing that no deed should be made unless the tax purchaser should give notice of application for deed three months before time for issuing it. The act was in terms retrospective.

The court, by Miller, J., said:

"The legislature may validate a void judgment if it is just to do so. Mechanics' Bank *v.* Union Bank, 22 Wall., 298. That a statute is not void because it is retrospective has been repeatedly held by this court; and the feature of the act of 1867 which makes it applicable to certificates already issued for tax sales does not of itself conflict with the Constitution of the United States. Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts that they may be affected in many ways by State and national legislation. For such legislation, demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal constitution so long as the obligation of performance remains in full force."

Accordingly it was held that the act in question was valid.

This decision was followed in Vance *v.* Vance, 108 U. S., 514.

The case of Satterlee *v.* Matthewson, 2 Pet., 407, was not unlike this. The case went up by writ of error from the Supreme Court of Pennsylvania. By the settled law of that State the relation of landlord and tenant could not subsist under Connecticut titles. While the suit was pending, and after it had been once tried, the Pennsyl-

vania legislature passed an act declaring "that the relation of landlord and tenant shall exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this commonwealth."

It was contended that this act was unconstitutional as destructive of vested rights. The court held the act to be valid.

Watson *v.* Mercer, 8 Pet., 88, is a leading case on this subject. Mercer and wife in 1785 conveyed land belonging to her. The certificate of acknowledgment being defective the Supreme Court of Pennsylvania held that the deed conveyed no title. Forty-one years after that the legislature passed a curative act making the deed effective. The court held that this act was valid, saying:

"So far, then, as it has any legal operation, it goes to confirm and not to impair, the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to give; and which from mistake or accident, has not been effected."

When a statute conferring jurisdiction is repealed, pending suits fall with it.

Ins. Co. *v.* Ritchie, 5 Wall., 544.

So of a suit for a statutory penalty when the statute creating the penalty is repealed.

Norris *v.* Crocker, 13 How., 439.

U. S. *v.* Tyne, 11 Wall., 88.

So the legislature may by retrospective statute allow appeal or writ of error on past judgments where none has been previously allowed.

Baltimore R. Co. *v.* Nesbitt, 10 How., 395.

Calder *v.* Bull, 3 Dallas, 386.

Cases where void deeds of married women have been validated are too numerous to mention.

Randall *v.* Krieger, 2 Dill., 444.

S. C., 23 Wall., 137.

Maynard *v.* Hill, 125 U. S., 210.

Richardson *v.* Bellingham Co., 47 Fed., 854.

Retrospective laws may deprive one of a defense based solely on a statute, such as usury.

Ewell *v.* Daggs, 108 U. S., 150.

Woodruff *v.* Scruggs, 27 Ark., 26.

And may take away execution judgment liens.

McCormick *v.* Alexander, 2 Ohio, 74.

And laborers' liens.

Bangor *v.* Golding, 35 Me., 73; 56 Am. Dec., 688.

After inquisition found under proceedings of eminent domain the legislature may set it aside, and direct a new inquisition.

Baltimore R. *v.* Nesbitt, 10 How., 395.

Essex Board *v.* Skinkle, 10 id., 334.

Retrospective laws repealing statutes for imprisonment for debt are not unconstitutional.

Sturgis *v.* Crowninshield, 4 Wheat., 201.

Van Hoffman *v.* Quinby, 4 Wall., 553.

As a remedy for the collection of debts it was more efficient than an attachment. It was not "in derogation of the common law." It was part of the common law by inheritance; and was no doubt familiar to Noah before he began to build the ark. How then is an attachment more sacred? The attachment laws are certainly "in derogation of the common law."

Hynson *v.* Taylor, 3 Ark., 555.

Edwards *v.* Cooper, 28 id., 469.

In the case of Watson *v.* R. Co., 47 N. Y., 157, one of the parties had a judgment lien on lands. Under a statute which did not require that holders of such liens should be made parties to proceedings to condemn lands by right of eminent domain they were condemned by

a railway company. There was a sale under the judgment, and the purchaser claimed them as against the assignee and receiver of the railway company. But the court held that the judgment lien was extinguished.

A court of chancery cannot, in correcting mistakes in written documents, divest the vested rights of third persons.

Davidson *v.* Davidson, 42 Ark., 362.

Woodworth *v.* Cook, 2 Blatchf., 151; 30 Fed. Cas., p. 561.

Gibson *v.* Cook, 2 Blatchf., 144; 10 Fed. Cas., p. 314.

Moloney *v.* Rourke, 100 Mass., 190.

Green *v.* Abraham, 43 Ark., 624.

The limitation on the power of a court of chancery to correct mistakes is therefore precisely the same that is applied to curative statutes.

Let us see how it has been defined by the Arkansas courts.

In Simpson *v.* Montgomery, 25 Ark., 365 (1869), a mortgage, or deed of trust, which is the same thing under the registration acts (Bowen *v.* Fassett, 37 Ark., 510), (1881), had been improperly acknowledged, so that its registration was not notice to anyone. After that the mortgagor conveyed to a third person who had notice of the mistake, though it was held that the registration imparted no notice. (P. 372.) On a bill filed to correct the mistake, the court held that, as the purchaser had actual notice of it at the time of buying, the relief prayed should be granted.

The court said:

"And this relief (for the correction of mistakes) is not only afforded against original parties, but also against those claiming under them as heirs, devisees, judgment creditors, or purchasers from them with notice of the facts."

In Stewart *v.* Pettigrew, 28 id., 372 (1873), a sheriff levied an execution on certain lands; but in his return and advertisement he

described them by the wrong numbers. Then they were levied on under a junior judgment; the proper numbers were given in the return and advertisement, and they were sold to a purchaser having notice of the mistake in the former return and advertisement. The court corrected the mistake, and quieted the title of the first purchaser.

There is no difference in legal effect between an attachment lien and a judgment lien.

Grubbs *v.* Ellison, 23 id., 287 (1861).

Meadow *v.* Wise, 41 id., 289 (1883).

Beard *v.* Wilson, 52 id., 296 (1889).

In view of that obvious fact the case of Blackburn *v.* Randolph, 33 id., 126 (1878), is conclusive of this controversy. The suit was in equity to correct a mistake in description of lands in a series of deeds, and was defended by one having an execution lien. In speaking of the previous case of Steward *v.* Pettigrew, *supra,* the court said: "Here was a total want of privity, and the court proceeded upon the broad ground that an honest mistake in a deed should be corrected against anyone who discovers it, and *without superior equity seeks to obtain an advantage from it.*"

In the case then before the court (Blackburn *v.* Randolph) it did not appear that the latter, who claimed under the execution lien, had any notice of the mistake until the commencement of the suit. The execution defendant had been adjudicated bankrupt; but the court declined to consider the effect that bankruptcy would have on the execution lien; but said:

"Even if the lien existed, the equity for correction would be prior in time; and, as this court has repeatedly held, *it would not be displaced* by the judgment lien *or an execution levied under it.*"

The next case, Allen *v.* McGaughey, 31 Ark., 253 (1876), is equally decisive. In that case suit was brought to reform description of land in a deed by substitution of another tract for that inserted.

Defense by purchaser under execution against the grantor. It was held that he was not an innocent purchaser for value; and a decree was rendered as prayed.

The case of Williams *v.* McIlroy, 34 id., 85 (1879), is very much the same. The action was ejectment. A deed had been made to the defendants, omitting one tract of land by mistake. They went into possession. Plaintiff levied execution on the omitted tract. Afterwards the grantor and the grantees, having discovered the mistake, the former made a second deed conveying to them the omitted tract. Plaintiff had a sale under the execution, bought in the omitted tract, got a sheriff's deed, and brought suit for possession. On the authority of Byers *v.* Engles and Allen *v.* McGaughey the court held that the execution purchaser got no title. The court held that by the second deed the grantor "did just what a court of equity upon the facts disclosed in the transcript before us would have compelled him to do;" adding: "The mistake in the original deed was thereby corrected, and the legal title to the land perfected in the grantees." Some stress is laid on notice from possession; whereas in the McGaughey case the subject of notice was not mentioned.

Brewster *v.* Clamfit, 33 Ark., 76 (1878), is in line with the others. There was an omitted tract, and opposition to reformation came from a judgment creditor having a lien. The only difference between this case and the others is that in this there was no execution lien. There had been no sale under the judgment. The court held that the judgment creditor was not in a position to oppose the reformation.

In Knight *v.* Glasscock, 51 id., 390 (1888), a deed was reformed over the objection of a purchaser with notice.

Fort Smith Milling Co. *v.* Mikles, 61 Ark., 123 (1895), covers every point. That was a case where land was misdescribed in a mortgage, and a suit was brought to reform. It was defended by a

purchaser under a judgment with notice. It was contended that under the doctrine of Main *v.* Alexander the relief must be denied; that is, counsel made precisely the same contention that is made here; but the court overruled it; holding that the doctrine of Main *v.* Alexander did not apply to a case of equities *dehors* the mortgage; and that they could not be defeated by purchasers with notice of them.

It is true that this decision was made after the adoption of the Arkansas statutes by Congress; but it is in line with previous cases, and is based on decisions made in other State that must command the highest respect.

See also Wadsworth *v.* Wandell, 5 Johns. Ch., N. Y., 224.

Bernardo Tp. *v.* Stebbins, 109 U. S., 391.

It must be perfectly plain, we think, that if the rights of lienholders, purchasers under judgments with or without notice, and purchasers at private sale with notice, had not such vested rights as would stay the hand of a chancellor in reforming a contract, they could hardly stay the power of Congress to pass a curative statute applying to cases as against precisely the same kind of rights.

Is it possible that we have two kinds of vested rights, one for the courts and another for Congress? If so, who shall draw the line of demarkation?

Mr. Cooley says:

"If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute."

Const. Lim., p. 457.

Green *v.* Abraham, 43 Ark., 423.

Could not Congress in the first instance have provided that actual notice of a mortgage should be equivalent to registration?

In Freeland *v.* Williams, 131 U. S., 405, the court held valid a clause in the constitution of West Virginia prohibiting the issue of process on any judgment previously rendered for damages for acts done during the rebellion according to the usages of civilized warfare. The court said, in speaking of the prior decision in Freeborn *v.* Smith, 2 Wall., 160:

"In the latter case Mr. Justice Grier, when the Congress of the United States had allowed an appeal where the judgment would otherwise have been final, used this language: 'If the judgment below was erroneous the plaintiff in error had a moral right at least to have it set aside; and the defendant is only claiming a vested right in a wrong judgment.' And he thus quotes the language of C. J. Parker, in Foster *v.* Essex Bank, 16 Mass., 245, 'The truth is there is no such thing as a vested right to do wrong; and a legislature which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.' "

In Freeborn *v.* Smith, 2 Wall., 160, there had been an omission to provide for writs of error in a certain class of cases, which was afterwards cured by act of Congress. It was objected that after the lapse of the term the judgment in the case on hearing had become final; and that it was beyond the reach of Congress.

The court, by Mr. J. Grier, said:

"What obstacle was in the way of legislation to supply the omission to make provision for such case in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct constitutional prohibition a State may pass retrospective laws, such as in their operation may affect suits

pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. * * *

"If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside; and the defendant is only claiming a vested right in a wrong judgment."

The court then quoted the language of C. J. Parker, in Foster *v.* Essex Bank, and added:

"Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power."

See also Sampeyrac *v.* U. S., 7 Pet., 222.

Goshorn *v.* Purcell, 11 Ohio St., 78.

Trustees *v.* McCaughey, 2 id., 155.

The legislature may recognize and sanction moral obligations that previously could not have been enforced. Thus betterment laws may be made to operate retrospectively.

Beard *v.* Dunsby, 48 Ark., 184.

Leighton *v.* Young, 52 Fed. Rep., 444, 18 L. R. A., 266.

So mechanic's liens are frequently created for work previously done.

Phillips Mec. Liens, sec. 23.

Best *v.* Baumgardner (Penn.), 15 Atl., 691.

Providence Institution *v.* Jersey City, 113 U. S., 315.

In Bolton *v.* Jones, 5 Penn., 145, 47 Am. Dec. 404, a mechanic's lien statute was held to operate retrospectively. Gibson, J., said, "But the scene may be changed by the introduction of a *purchaser for value actually paid.*"

A repeal of a statute does not take away a vested right.

St. Louis R. *v.* Alexander, 49 Ark., 190.

Porter *v.* Doe, 10 id., 187.

Files *v.* Fuller, 44 id., 281.

South Carolina *v.* Guillard, 101 U. S., 433.

Memphis *v.* U. S., 97 id., 293.

Webster *v.* Cooper, 14 How., 488.

The repeal of the attachment laws would have the effect to dissolve a pending attachment.

National Bank *v.* Riethman, 79 Fed. Rep., 582, Ct. App., Eighth Circuit.

No creditor has a vested right in a particular remedy.

Tennessee *v.* Sneed, 96 U. S., 69.

Perriman's Case, 103 id., 720.

1 Kent Comm., 455.

As to curative acts "the question is one of reasonableness."

Terry *v.* Anderson, 95 U. S., 80.

State *v.* Newark, 27 N. J. L., 197.

5. In the construction of curative acts there is a wide difference between claims that are based on contracts and non-contractual claims.

In Louisiana *v.* Mayor of New Orleans, 109 U. S., 285, a judgment having been obtained against the city for a tort, the legislature afterwards passed an act to lessen the rate of municipal taxation, which practically cut off all remedy for the collection of the judgment. The court say:

"The effect of this last limitation is to prevent the relators, who are not allowed to issue execution against the city, from collecting their judgments, as the funds receivable from the tax thus authorized to be levied are exhausted by the current expenses of the city, which must first be met."

The court, however, held that the act was valid because no contractual relation existed between the parties; and that the fact that the claim had been reduced to judgment made no difference.

To the same effect:

Louisiana *v.* St. Martin's Parish, 111 U. S., 716.

Freeland *v.* Williams, 136 id., 405.

Chase *v.* Curtis, 113 id., 463, 464.

Wisconsin *v.* Ins. Co., 127 id., 292.

As to rights growing out of contracts the rule is thus stated:

" When a right has arisen *upon a contract, or a transaction in the nature of a contract* authorized by statute, and has been so far perfected *that nothing remains to be done by the party asserting it,* the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of this statute."

Steamship Co. *v.* Joliffe, 2 Wall., 457.

Freeland *v.* Williams, 136 U. S., 405.

Chase *v.* Curtis, 113 id., 463, 464.

It may be said that the proceeding of plaintiff in error is not for a tort; but that is an evasion. It is certainly not based on any contract. It is nothing less than surprising that counsel for the attaching creditors should say that the judgment against Blocker amounts to a contract with the interveners. A judgment, even when rendered on a contract, is not a contract.

Morley *v.* R. C., 146 U. S., 146.

Louisiana *v.* Mayor, 109 id., 288.

Garrison *v.* New York, 21 Wall., 203.

XVI.

The dissenting opinion of his honor, Judge Sanborn.

Occasional extracts from this opinion will show the grounds of our contention.

1. "The act of Congress had the effect to transfer instantly *property* of the value of $55,875.71, from the defendants in error to the Evans-Snider-Buel Company."

If that were true the conclusion reached would be invincible.

If it were true it would open a new and an easy road to wealth, of which no doubt many would gladly avail themselves. If by suing out an attachment the plaintiffs acquired an actual right of property there would be an end of controversy, because the legislature could not take it away without just compensation, at least, and the courts could not change the status. Such being the case an intervention could only be inspired by folly or madness. But we do not think that it was ever understood that when a plaintiff in attachment or execution obtains a levy he thereby acquires a property in the thing seized. So when a libellant in admiralty causes a ship to be seized, or a plaintiff in equity obtains the appointment of a receiver, the title to the property is not changed.

In none of these cases does the seizure in any manner affect the title.

High, Inj., secs. 1, 5.

If the rule were as stated in the dissenting opinion the question of title would be settled by the clerk and marshal at the inception of the suit, leaving third persons to whom the property belonged no right to be heard; and this would not be due process of law.

We have already discussed this question.

If a lien implies the transfer of a property right, then it is clear

that the men who made the English language did not know what they were talking about; for both etymologically and otherwise the words "attachment" and "lien" denote the act of tying up; and not an act of adjudication, appropriation or confiscation.

The lien, after all, amounts only "to a security against subsequent purchasers and incumbrances."

4 Kent, Comm.,* 436.

An attachment lien is not a lien at all, but only by analogy so called.

1 Jones, Liens, sec. 12.

"It is a well settled principle that an attaching creditor can acquire through his attachment no higher or better rights to the property attached than the defendant had *when the attachment took place,* unless he can show some fraud or collusion by which his rights are impaired."

Drake, Attachm., sec. 223.

The italics are those of the author.

Again the same author says:

"A fundamental principle is that an attaching creditor can acquire no greater right in attached property than the defendant had *at the time of the attachment.* If therefore the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debts. Thus a chattel pawned or mortgaged is not attachable in an action against the pawner or mortgagor."

Id., sec. 245.

Again the italics are those of the author.

In Arkansas the interest of the mortgagor of chattels cannot be levied on.

Jennings *v.* McIlroy, 42 Ark., 236.

Buck *v.* Bransford, 58 id., 291.

Cox *v.* Harris, 64 id., 214.

"An attachment consfitutes a lien merely upon the land; but the general property of the owner is not divested."

Merrick *v.* Hull, 15 Ark., 344.

In that respect the court liken it to "a proceeding *in rem* in admiralty."

There were certain ill considered *dicta* on this subject in Bigelow *v.* Topliff, 25 Vt., 273, but they were overruled in Hackett *v.* Callender, 32 id., 108, in which case the court said:

"There is an obvious difference in the equities of a subsequent *bona fide* purchaser of land without notice of a trust and of a creditor who attaches to secure an antecedent debt. The purchaser advances his money to buy the land. He gives a new consideration. He parts with a new value upon the credit of the record title. The attaching creditor merely seeks to secure an old debt. He advances nothing on the strength of the record title. He is not made worse by relying upon it. The omission of the real owner to record his deed has not injured the creditor, or been the means of depriving him of any value. * * * If a creditor, relying on his attachment and the record, had surrendered other securities, he might have a superior equity. But the case at bar shows no such or similar equity. It is merely the case of an attaching creditor attempting to secure an old debt against an insolvent debtor by attachment. No new value, credit or consideration is shown, no securities lost, endangered or surrendered.

"Analogous decisions sustain this distinction. When goods are obtained by false pretences the subsequent purchaser without notice obtains a good title to them. Not so the attaching creditor. He gets nothing by his attachment. He stands in the shoes of his debtor. * * * When the purchaser has paid his money and bought the legal title he has at least an equal equity with the *cestui*

que trust; and having the legal right also, his title and equity united give him precedence. But the attaching creditor upon an antecedent debt has neither the equity nor the legal title; and notice to him of the trust before he gets the legal title by levy, and so discharges his debt, should put an end to his lien as between him and the real owner."

This was affirmed in *Perrin v. Reed,* 35 Vt., 8; *Hart v. Farmers' Bank,* 33 id., 253.

The authorities on this subject are too numerous for citation. Many of them will be found by reference to 20 Encyclopedia of Law, p. 577.

2. "In the discussion of the question at issue it must be borne in mind that it was not a mere judgment against the person, or the right to enforce such a judgment, or a mere general lien to secure it of which the defendants were here deprived."

This seems to be a case of inverted sympathy. No one can be deprived of anything that he never had. The lien was subsisting; but as it was purely remedial, and something subject to congressional control, it is evident that the attaching creditors have lost nothing except a delusive hope of appropriating to their own use property on which they never had a shadow of an honest claim. For it they have never paid a cent; for it they do not propose to pay a cent; yet they make the welkin ring with the cry of "Stop, thief!" If the law were only an unmitigated game of grabs one could perceive some ground for such ejaculations.

3. "The Supreme Court of Arkansas for forty-eight years have held that a failure to record a mortgage raised a conclusive presumption of fraud." On the other hand the same court has consistently held for about the same length of time that one who, with knowledge of the facts, abuses the process of the courts by seizing property belonging to a third person is guilty of an actual fraud. So the honors are easy, except that one would rather be accused of constructive than of actual fraud.

The real question is what is fraud? A false nomenclature proves nothing. The purest and most sublime precepts of morals and religion have been made the subjects of mockery and derision. "Fraud," says Mr. Roberts, "consists either in a single act, or in a continual series of acts, and two parties are always necessary—a person deceiving, and a person to be deceived—to give it that action and determination which renders it the subject of human cognizance and law."

Fraud. Conv., p. 30.

How have the plaintiffs in error been deceived, and by whom?

The conflict of decisions liberates the principle. As truth is better than falsehood, fact more trustworthy than legal fictions, let us see where the truth really lies; even in a legal discussion it may be entitled to some weight since the law is not yet wholly reduced to mathematical formalism.

There is no doubt about the facts. The Evans-Snider-Buel Company advanced to Blocker about $130,000 for the purpose of buying the cattle in controversy; and this was all that was paid for them. The Evans-Snider-Buel Company took mortgages to secure the advances. They are purchasers for value.

Fargason *v.* Edrington, 49 Ark., 214 (1887).

Gerson *v.* Pool, 31 id., 85 (1876).

Kesner *v.* Trigg, 98 U. S., 50.

They are also creditors, if there is any magic in that word. At that time McFadden & Son had a judgment against Blocker in Texas. There is nothing to show that the Evans-Snider-Buel Company had ever heard of McFadden & Son, or of their judgment. But the advances to Blocker, and the mortgages did not in any way lessen the security which they had for their judgment, or impair any right or hope of theirs. The chance was that the transaction might be a benefit; which it would be if the cattle should sell for more than the

advances. Now McFadden & Son are seeking to appropriate the large sum for which they had judgment against Blocker from the Evans-Snider-Buel Company, on account of the merest legal technicality, vociferating that the Evans-Snider-Buel Company committed a gross fraud against them in not recording mortgages which the law did not allow to be recorded (!), or rather for recording them when the law made no provision for recording them. And all of this time Blocker & Son admit that they had all of the knowledge of the mortgages that they could have acquired if the law had made provision for their registration. If there can be any dispute about the morals of such a case we are willing to place the profoundly just and honorable opinion of Lord Hardwick in Le Neve *v.* Le Neve alongside of the grotesque utterances in Main *v.* Alexander, and then let this court decide.

"Of two such lessons why forget
The nobler and the manlier one?"

4. "The suggestion of the majority that the judgment against Blocker did not evidence a vested right in the cattle in the defendants in error as against the Evans-Snider-Buel Company does not seem to be founded in fact, because, while that judgment did not estop the company from claiming the cattle from the defendant in error, and from litigating their claim, it did vest in the defendants in error an established lien and interest in the cattle superior to that of the Evans-Snider-Buel Company which was no longer open to doubt or controversy in the courts, or under the law of the land."

According to this view the judgment against Blocker would not prevent the interpleader from having a trial on the interplea, though such a trial could not possibly avail them anything.

We understood his honor, Judge Sanborn, in Waples-Platter Co. *v.* Low, 54 Fed., 95, to say:

"Thus it will be seen that the issues between the plaintiff and

defendant and those between the plaintiff and the interpleader were not identical; and to prevent confusion and error it was imperatively necessary that the court should keep the broad distinction between them clearly in mind, and should carefully and distinctly present it to the jury in its charge. The practice of trying these issues together and to the same jury is deprecated. The better practice is to first and separately try to the court the issue between the plaintiff and defendant arising under the attachment affidavit. Sanger *v.* Flow, 1 C. C. A., 56, 61; 48 Fed. Rep., 152; Holiday *v.* Cohen, 34 Ark., 707, 716. The difficulty, confusion, and error that are liable to result from a trial of both issues together to the same jury are well illustrated in this case."

If a judgment against the defendant precludes the interpleader as well as the defendant, we do not see why the trials should be separate. We have seen that the interpleader cannot make himself a party to the proceedings as against the defendant. (*Ante*, p. 5.) If then the finding on that issue precludes the interpleader he is condemned unheard.

No sensible person would interplead under such conditions; as it might well happen that the defendant might have no defense, or might in any case refuse to defend.

In Huiscamp *v.* Moline Wagon Co., 121 U. S., 319, after speaking of the proof that the attaching creditors must make in order to sustain the attachment, the court said:

"Such proof could not be made as against the interpleaders, * * * by proving that the issue as to the intent of Rummel (the defendant in the attachment) had been tried and found against him in the trial on his plea of abatement (denying allegation of fraud on which the attachment was obtained). That was an issue to which the interpleaders were not parties; and the record of its trial was wholly inadmissible as against the interpleaders."

If the view expressed in the dissenting opinion is correct it is certainly strange that it was never suggested in the scores of railway foreclosure suits that have come to this court solely on controversies growing out of interventions. Appended to the judgment against Blocker was this order:

"And it appearing to the court that the Evans-Snider-Buel Company have interpleaded in this cause, claiming the property levied on under the writ of attachment sued out by the plaintiffs, and levied upon as the property of J. R. Blocker, and that said interplea is yet undisposed of, and waiting trial thereon; and the plaintiffs having filed their application in due form for a change of venue of this cause to one of the other places of holding court in the northern district, said cause is hereby transferred to Tahlequah, one of the places of holding court in the said district; and plaintiffs are given until the first day of next term of court to be held at Tahlequah, to plead, answer or demur to said interplea."

In the dissenting opinion various cases are cited to show that the final judgment against the defendant relates back to the beginning of the lien and perfects it; but these decisions only relate to the rights of the plaintiff and the defendant. In none of them were the rights of interveners discussed or involved. A judgment only binds parties and privies; and the judgment against Blocker was as to the interpleaders only waste paper.

The dissenting opinion calls the curative statute "an arbitrary act of Congress;" but it does not seem to be more arbitrary than a decision taking the property of A and giving it to B upon a lot of fine-spun and contradictory technicalities, none of which has the least bearing on the very right and justice of the case.

We are unable to perceive the applicability of Fletcher *v.* Peck, 6 Cranch, 135; Calder *v.* Bull, 3 Dallas, 383; Gunn *v.* Barry, 15 Wall., 610, and other cases resting on contracts.

In the first of these cases the court said:

"When then a law is in its nature a *contract*, when absolute rights have vested under that *contract*, a repeal of the law cannot divest those rights."

The law encourages the making of contracts by which individuals enact laws for themselves in a small way; for nothing else does so much to cement all elements of society into a common unit; not even the domestic relations which form only local aggregations. Next to the duty of keeping the peace, governments are organized for the purpose of preserving and promoting good faith and integrity in the performance of contracts. Apart from these governments, with their vast and reiterating burdens, have no excuse for being. It is true that in the case of a contract the right and the remedy, or some adequate remedy, are inseparably connected; because the contract is indestructible; and an adequate remedy is in the contemplation of the parties, and is made a part of it. But the government has entered into no unholy compact that anyone shall have a sacred right to take the property of a third person to pay the debts of another. To prevent this kind of outrage many curative acts have been passed in furtherance of justice; and very much to the relief of the courts which cannot but mourn over acts of injustice, especially when inflicted in the name of the law. It is not in vain that government enforces contracts. The educational influence is so great that the more contracts that are made the better will they be kept. At present in this country it would not perhaps be too much to say that on an average not one contract out of a million ever finds its way into the courts.

In Gunn *v.* Barry and cases of that sort it was held that an exemption law could not be made to operate so as to cut off or diminish the rights of existing creditors; because when contracts are made the pecuniary condition of one or other or both of the parties enters largely into the inducement to make it; hence the court in Gunn *v.*

Barry said: "The legal remedies for the enforcement of a contract which belong to it at the time and place where it is made are a part of its obligation."

When plaintiffs in error made their contract—if there was a contract (even that does not appear)—they had a right to rely on the pecuniary resources of Blocker; but they had no right to expect that the law would issue to them letters of marque and reprisal to enable them to ravage the property of third persons; and so they are not the victims of bad faith, as we are feelingly told. If they had had a contract with the defendant in error the case would have been different; for the right to contract and the sacredness of contracts lie at the foundation of all civil government.

5. "The standard of moral right or wrong in the minds of men is variant."

Not so variant but that it would be universally held that it is morally wrong for A by force to take the property of B to pay the debt of C. It has been often said by the courts that a wrong is none the less a wrong because perpetrated under the forms of the law. Sometimes, it is true, in the administration of justice, general rules operate harshly on individuals; but such cases are rare, and should be reduced to a minimum. It is not at all difficult to tell who paid for the cattle, if that is a matter of any concern.

6. "The only way which they (the Evans-Snider-Buel Company) found to open this vested right and interest to doubt or to controversy was to secure this arbitrary act of Congress boldly taking it (the property attached) from the defendants in error, and transferring it to this mortgagee."

The act is a general act; and there is nothing to show that its passage was procured by improper means—if such evidence was admissible. We have sometimes seen it asserted in newspapers that the national destiny was being deflected by the influence of vast aggre-

gations of capital; but never that the august co-ordinate could be moved from the path of duty by a herd of cattle on a western prairie. Very many such statutes have been passed in this country; and they have always been favorably construed.

Of course if every one that makes a grab and gets hold of the property of a third person thereby obtains a "vested right"—whatever that may be— it will be found that most curative acts can be evaded by a lot of men who are neither innocent nor purchasers, but who for interested purposes masquerade under the guise of such.

Moreover, it is said to be a principle quite elementary that fraud alone, however dark, will not justify an action, but that it must be also shown that the plaintiff has suffered some injury thereby. (Clarke *v.* White, 12 Pet., 178.) Admitting then that it was a fraud for the plaintiff to make the advances and take the mortgages, how have the plaintiffs been injured by these acts?

XVII.

All of the questions arising in this controversy were decided in our favor in a case involving precisely the same identical statute relating to registration of mortgages. That decision was rendered by this court just fifty years ago; and it has never been overruled, or even criticised.

We refer to the case of Fowler *v.* Merrill, 11 How., 375 (1850), an Arkansas case.

Merrill brought suit to foreclose a mortgage executed by F. L. Dawson, dated November 25, 1837, on certain slaves, alleging that James L. Dawson, James Smith, William Dawson and others had since got possession of the slaves, "and that, although they were bought *with full notice of Merrill's prior rights to them under the above mortgage,* yet the respondents all refuse to deliver them to him, or pay their value and hire toward the discharge of the mortgage. Wherefore he prayed that each of them be required to deliver up the negroes in his possession, and account for their hire, or to pay for their value."

The defendants claimed under an execution sale on judgment against the mortgagor, made for payment of a debt, in October, 1841. It was claimed by them that as there was no valid registry of the mortgage, and as the slaves were left in possession of the mortgagor, and as they "were innocent purchasers, and without notice of the mortgage, the latter was consequently void."

The mortgage was acknowledged, and was registered November 24, 1837; *but at that time there was no statute providing for the registration of mortgages.* The statute first providing for registration was approved February 20, 1838.

Rev. Stat. Ark., p. 580.

But by a provision contained in the Revised Statutes (Ch. 129, sec. 5) it was declared that all the chapters, though approved on different days, should "be deemed to have been passed on the same day," and that they should all take effect from a day to be fixed by proclamation of the governor (*id., sec. 25*). By this proclamation, afterwards made, the Revised Statutes went into effect March 11, 1839, *over a year after the mortgage was registered.*

Though there was no law that would admit of the registry of the mortgage until more than a year after it was recorded, the court say:

"Such a registry, however, still tended to give publicity and notice of the mortgage, and to prevent as well as repel fraud; and it would, under the statute of frauds in Arkansas, *make the sale valid,* if *bona fide* and for *good consideration, unless against subsequent purchasers without notice,*" citing the section of the statute, *ante,* p. 19.

As to notice the court held that each of the defendants had actual notice, "proclaimed publicly at the sale" under which they bought, and otherwise; saying, in speaking of their purchase after this notice:

"According to some cases this conduct of theirs under such circumstances would seem more fraudulent than any by Merrill," citing Le Neve *v.* Le Neve, 3 Atk., 646, and other cases."

As to the objection that possession was not delivered to the mortgagee, the court said:

" * * * In conditional sales, especially on a condition precedent *bona fide,* the vendor, it is usually considered, ought not to part with the possession till the condition is fulfilled."

As to the registration the court held that although originally invalid, yet when a statute providing for registration of mortgages of like kind went into effect, the former registration was validated;

and that additional registration was not necessary. *This gave to the statute precisely the effect of a curative act.*

At that time the constitution of the State contained this provision:

"That no free man shall be * * * deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

Const. Ark. 1836, art. II, sec. 10.

This constitutional provision is the precise equivalent of the Fifth Amendment to the Federal constitution. If then the legislature could pass an act which indirectly had the effect of a curative act, it could have done the same thing directly; and the powers of Congress are equally extensive. How then can it be said that Congress had not power to pass the curative act in question?

As this case also holds that the mortgage was not void because the possession of the property was not delivered to the mortgagee, it effectually disposes of the case of Watson *v.* Thompson Lumber Co.

The resemblance between the case of Fowler *v.* Merrill and that now before the court is most striking.

Considering the unusual state of the facts, and that the same questions arise on the same statute, with an interval of half a century, it is probable that the coincidence could not be matched in the whole range of jurisprudence.

Respectfully,

U. M. ROSE,
W. E. HEMINGWAY,
G. B. ROSE,
For Defendant in Error.

IN THE

Supreme Court of the United States,

October Term, 1900.

WILLIAM H. McFADDEN, *in his own right,* W. P. McFADDEN AND JAMES McFADDEN, *executors of* WILLIAM McFADDEN, *Deceased*.. .. ..*Plaintiffs in Error.*

v. **No. 520.**

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. B. SPALDING ET AL.

Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Additional Brief for Defendants in Error.

We called attention in former brief (p. 5), to the fact that the answer to the intervention did not allege fraud, or that the chattels remained in possession of the mortgagors. On the contrary the answer denies "that the Evans-Snider-Buel Company are the owners of or entitled to the possession

of the cattle levied upon by the marshal under the writ of attachment in this cause." Tr., p. 7. The transcript wholly fails to show that the questions presented here were raised in the trial court.

It may also be noted that the attachment in this case was issued June 17, 1896, at which time none of the debts secured by the mortgages had matured.

The first case that came up under the registration laws of Arkansas was *Merrill v. Dawson, Hempstead,* 563, decided June 3, 1847, in which the court held that actual notice of the mortgage bound the execution purchasers, citing the second section of the act in the *Revised Statutes.* See synopsis hereto annexed, page 7.

The next case was *Main v. Alexander,* 9 *Ark.,* 112, July term, 1848, holding the reverse. The court evidently knew nothing about the ruling made in *Merrill v. Dawson,* which was not published until 1856.

The next case was *Fowler v. Merrill,* 11 *How.,* 375, 1850, the same case as *Merrill v. Dawson, supra,* on error. The court affirmed the decree below, holding that actual notice of the unrecorded mortgage bound the execution purchaser, citing the seventh section of the *Revised Statutes.* Synopsis, page 8.

Turning to the original report we find that Mr. Lawrence, of counsel for the execution creditors, cited for the consideration of this court Main *v.* Alexander more than once, as conclusive of the controversy, urging that "the decisions of the State court on its own statutes is the rule of the United States Courts." Pp. 385, 386, 387.

The court refused to follow Main v. Alexander, because the Supreme Court of Arkansas had overlooked decisive provisions of the statute.

The next case was *Byers v. Engles,* 16 *Ark.,* 543, June term, 1855. It is certainly very singular that the court in deciding that case had no knowledge of the case of *Fowler v. Merrill,* though the volume — 11 Howard — had been published in 1851. It is by no means singular that it reached precisely the same conclusion that had been previously reached by this court, and on the same grounds.

It will be seen that in the act of 1846 (synopsis, p. 8) actual notice as to purchasers is made equivalent to registration; but the words "without actual notice thereof" are not repeated in the subsequent clause relating to creditors; it was however construed as applying equally to both clauses, as it would have been an absurdity to give creditors a higher position than innocent purchasers.

Byers *v.* Engles, 16 Ark., 547.

The act of 1846 (synopsis, p. 8), which only relates to lands, did not repeal sections 2 and 7 of the original act; and both acts still remain in force; and they have both been carried through several official digests down to the last, that of 1894, Sandels & Hill's Digest, secs. 3473, 3475, 3477, 728.

If this court in 1850 would not follow *Main v. Alexander,* it is difficult to say why it should do so now when the statutes remain wholly unchanged, and when the Supreme Court of Arkansas has repeatedly expressed a regret that that decision was ever made. See former brief, p. 22.

There was another reason why this court could not follow *Main v. Alexander.* The rule established in *Le Neve v. Le Neve* and in *Byers v. Engles* was an equitable one, not dependent on the statute; for no registry statute could be more stringent than the one applied in *Le Neve v. Le Neve.* The rule that an executon plaintiff buying with notice of a prior conveyance is a *mala fide* purchaser was not applied at law in England previous to the late Judicature Act; but in this country it has been applied both at law and in equity. Former brief, p. 17.

Byers v. Engles and *Fowler v. Merrill* were both cases in equity; but since 1868, when the reformed code procedure was adopted in Arkansas, if a case at law involves equitable principles they are applied just as if the cause was heard in equity.

Mansfield's Digest, secs. 4925-4929.

Pollock *v.* Taylor, 26 Ark., 54.

Organ *v.* Ry., 51 id., 260.

Counsel for plaintiff in error rely on *section* 721 *Revised Stat. U. S.,* providing that "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision."

But this statute does not apply to equitable proceedings.

Bucher *v.* Ry., 125 U. S., 582.

Russell *v.* Southard, 12 How., 147.

Neves *v.* Scott, 13 id., 272.

Nor does this statute apply to questions of a general nature.

Boyce *v.* Tabb, 18 Wall., 546.

Olcott *v.* Supervisors, 16 id., 688.

Hough *v.* Ry., 100 U. S., 225, 226.

But the principle applied in *Byers v. Engles* has been applied also at law in Arkansas.

Wilson *v.* Slaughter, 53 Ark., 139.

Williams *v.* McIlroy, 34 id., 92.

As this court decided this question so long ago it is not bound now to follow State decisions which are discordant and fluctuating.

Pana *v.* Bowler, 107 U. S., 540.

The rule that the legislature in adopting a statute from another State is presumed to adopt the construction previously placed upon it, is of course a pure fiction, which ought not to be allowed to work any wrong. It ought not to apply in this case because it is obvious that in deciding *Main v. Alexander* the court overlooked important and decisive statutes; as was held by this court more than half a century ago. These statutes were in force on the 2d of May, 1890, and under the act of Congress they emigrated to the Indian Territory. Add to this that the Supreme Court of Arkansas has often regretted the unlucky decision in Main *v.* Alexander, then certainly the question now presented is one of easy solution.

Counsel argue that the case of Watson *v.* Thompson Lumber Co., 49 Ark., 83, 1886, settled the law that a mortgage is void if the mortgagee remains in possession; such possession being evidence of fraud. But the opinion contains no intimation of a purpose to overrule previous decisions settling that question the other way (see former brief, p. 39), followed

in *Tennant v. Watson,* 58 *Ark.,* 252, *Ames Iron Works v. Kalamazoo Pulley Co.,* 63 *id.,* 87. Certainly if one purchasing at his own attachment sale only gets what estate the debtor had at the time his lien attached, he cannot be in any better plight before the sale. That retention of possession even in case of a sale of chattels may be explained was also held in Valley Distilling Co. *v.* Atkins, 50 id., 289, Shaul *v.* Harrington, 54 id., 307, White *v.* McCracken, 60 id., 616, Adler-Goldman Co. *v.* Phillips, 63 id., 41, and Hight *v.* Harris, 56 id., 98.

But if we could concede that the decision in the Watson Lumber Co. case really rests on the unexpressed notion that there was no change of possession, then the ruling would be in conflict with the plain language and meaning of the statute.

In Arkansas the law as to fraudulent conveyances has been reduced to statute.

Shaul *v.* Harrington, 54 Ark., 308.

The original act in the *Revised Statutes* contains the whole of that law; but sections 3 and 7 expressly declare that it shall not apply to purchasers with notice of prior rights, for the very good reason that they are themselves seeking to perpetrate a fraud.

We have shown in a former brief that the *Thompson Lumber Co.* case went off on a mistaken view of the registration law, based on cases wholly irrelevant. It did not purport to be based on the statute; and the court held that there was no statute applying to the case; which indeed is self-evident.

Moreover this court in *Fowler v. Merrill* held under the same statutes that retention of possession by the mortgagor did not establish a charge of fraud. The Supreme Court of Arkansas has often asserted the same principle.

It is consoling to reflect that the fangs have finally been drawn out of *Main v. Alexander.*

In *Leonhard v. Flood,* 68 *Ark.,* 162, it appeared that Flood and wife had given a mortgage to Leonhard; but the mortgage was not properly recorded; and the defendant, who had purchased from the mortgagors after the execution of the mortgage, pleaded that fact, and that it was no lien as to them.

The court said that there was evidence tending to show fraud in the sales to defendants; but added:

"*Leaving out the question of fraud,* our conclusion is supported in this case by another reason. Leonhard, by the note and mortgage, showed that he had a valid lien on the property as against Henry and Catherine Flood. The defendants, who claim as purchasers from them after the execution of the mortgage, must, in order to sustain their claim, show facts making such purchase superior to the rights of Leonhard; and to this they must show a consideration for such purchase." P. 168.

That is to say that the purchaser must show that he is a *bona fide* purchaser for value; but by an unbroken line of decisions in Arkansas an attaching or execution creditor is not a purchaser for value; certainly not when he has notice of a prior valid claim. Former brief, p. 26.

"If anyone has a right to property, such right is a perfect and exclusive right; but no one can have such right

before he has acquired a better right to the property than any other person in the world; a right therefore only to recover property cannot be called a perfect and exclusive right."

Calder *v.* Bull, 3 Dall., 394.

Bank of Hamilton *v.* Dudley, 2 Pet., 523.

In that case the court said:

"The mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the legislature."

It is impossible to decide the present case without reference to its moral aspects. In *Wilkinson v. Leland,* 2 *Pet.,* 661, the statute made valid a title that previously was absolutely void; the court saying: "The sale was ratified by the legislature not to destroy existing rights, but to effectuate them." Here the curative act was passed to make good the clearly moral right of the mortgagee.

All presumptions are in favor of its constitutionality.

Nichol *v.* Ames, 173 U. S., 509.

In *Sampeyrac v. U. S.,* 7 *Pet.,* 239, after time for filing a bill of review had expired Congress passed an act which validated the bill of review previously filed beyond the time limit in that case. The court said: "But the act in terms applies to bills filed or to be filed; and of course cures this defect, if any existed. Such retrospective effect is no unusual course in laws providing new remedies. * * * It therefore forms no objection to the law that the cause of action existed antecedent to its passage, so far as it applies to the remedy, and does not affect the right."

That case arose and was decided when Arkansas was still a territory.

In speaking of *Watson v. Mercer,* 8 *Pet.,* 88, and *Satterlee v. Matthewson,* 2 *id.,* 380, counsel say (brief, p. 11) that these decisions would not have been made if the XIV Amendment had then been in force.

There is nothing in that contention. Both cases were from Pennsylvania, and originated while the Constitution of 1790 was in force, which separated the departments of government, and provided (sec. 11, art. 9): "That all courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation *shall have remedy by due course of law,* and right and justice administered without sale, denial or delay."

2 Poore, Constitutions, 1555.

Of course both the clause in the XIV Amendment and this clause in the Pennsylvania Constitution are derived from the Magna Charta; and their meaning is the same. Thus construed:

Pickering *v.* Rutty, 1 S. & R., 510 (1815).

Trustees *v.* Robinson, 12 id., 29, 34 (1824).

Counsel say that "The attaching creditor in this case stands on the same footing as a purchaser for value." Brief, p. 22. If that is so then the attaching creditor *is* a purchaser for value. He cannot be anything more. But in *Byers v. Engles,* 16 *Ark.,* 543, it was held that one was not a purchaser for value if he had notice of an outstanding title at any time before the sale; and in *Fowler v. Merrill,* 11 *How.,* 395, the court held that notice at any time before payment of the purchase money by the purchaser under execution defeated his claim to be an innocent purchaser. The case made in *Byers v. Engles* did not call for the full statement of

the rule; but in other cases the principle thus enounced in *Fowler v. Merrill* has often been affirmed.

Byers *v.* Fowler, 12 Ark., 286, 1851.

Duncan *v.* Jordan, 13 id., 190.

Pond *v.* Obaugh, 16 id., 96.

Massie *v.* Enyart, 32 id., 257.

Whiting *v.* Beebe, 12 id., 552.

The same authorities show that no one is an innocent purchaser who has not acquired the legal title. Also

Smith *v.* Orton, 131 U. S., lxxv.

In some of the States creditors and *bona fide* purchasers without notice have been placed on the same footing; but that was a mistake.

Lowell, Transfers of Stock, sec. 104.

There is no trace of such a doctrine in Arkansas; and it was expressly repudiated in *Byers v. Engles.*

The first case cited by counsel for defendant in error, *Pyeatt v. Powell,* 51 *Fed.,* 551, is destructive of their whole contention. McClellan mortgaged the horses mentioned to Powell July 18, 1888. McClellan at that time lived in the Indian Territory, and the horses were there; but the mortgage was executed in Kansas. It was not recorded in Kansas, and it was not recorded in the Indian Territory because there was no law there for the registration of any mortgage. The marshal of the Indian Territory on the 4th of October, 1889, levied on the horses under an execution in favor of Pyeatt and Kirby; and Powell sued the marshal in the United States Court for the Indian Territory in replevin. By amendment Pyeatt and Kirby were made defendants in place of the marshal.

Here we have the same state of facts existing in the present controversy; a controversy between a mortgagee holding under an unrecorded mortgage and defendants claiming under a levy.

The court held that there was no need to record the mortgage in Kansas, that the case was to be settled according to common law rules, there being no registry laws in the Indian Territory; and that, it being shown that the mortgage was fair and free from fraud, the right of the mortgagee was superior to that of the plaintiff in the execution. Sanborn, J., delivering the opinion of the court, said (p. 554):

"The primary question on trial was whether plaintiff or defendants were entitled to the possession of the property; and this mortgage if valid, and its past due debt, if unpaid, established the plaintiff's contention. * * * A chattel mortgage, not fraudulent as to creditors, made in good faith, to secure an honest debt, is at common law superior to a subsequent attachment of the same property by a creditor of the mortgagor."

The court also held that this was true whether the attaching creditor had notice or not. P. 556.

It is true that the court in the statement of facts said that there was evidence tending to show that the mortgagee took possession of the property before the levy; but that question was not raised or presented in any way in the two instructions excepted to, was not before the court, and was not made a basis of the decision.

By levy of attachment plaintiff only acquired a lien on the equity of redemption; and his levy did not amplify the estate of the defendant.

Vattier *v.* Hinde, 7 Pet., 271.

Boone *v.* Chiles, 10 id., 212.

Wallace *v.* Bartle, 21 Iowa, 346; 89 Am. Dec., 584.

Bush *v.* Bush, 3 Strobh., Eq., 131; 51 Am. Dec., 675.

Walton *v.* Hargroves, 42 Miss., 18; 97 Am. Dec., 429 and note.

The purchaser at an attachment sale, even without notice, does not stand in the position of a *bona fide* holder of commercial paper.

Klatt *v.* Dummert (Minn.), 73 N. W., 404.

"Attachment constitutes a lien merely upon land; but the general property of the owner is not divested."

Merrick *v.* Hutt, 15 Ark., 344.

"An attaching creditor is not a subsequent purchaser for value; and an unrecorded deed or other instrument creating a lien will take precedence over a subsequent attachment."

Rea *v.* Wilson (Iowa), 84 N. W., 539.

Murphy *v.* Plankinton Bank, 13 S. D., 501; 83 N. W., 575.

Hodgson *v.* Libby (N. H.), 43 Atl., 322.

Karger *v.* Steele-Wedeles Co. (Wis.), 79 N. W., 216.

Undoubtedly so where the attaching creditor has notice.

Nat. Loan Co. *v.* Blair (Va.), 36 S. E., 513.

Barnett *v.* Squyres (Texas), 54 S. W., 241.

Clift *v.* Williams (Ky.), 40 S. W., 328.

"Notice to a subsequent purchaser or mortgagee before completion of the sale or mortgage of an unrecorded mortgage is conclusive evidence of *mala fides* on his part."

Jones, Chat. Mortg., sec. 312, and many cases cited.

So a legislative grant of immunity from taxation for a fixed period does not create a vested right.

Citizens Bank *v.* Owensboro, 173 U. S., 643.

Rights "are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event."

Pearsall *v.* Ry., 161 U. S., 673.

Bank of Commerce *v.* Tennessee, 163 id., 422.

"Levying an attachment has the double effect of creating a lien and instituting an action. But the lien is only inchoate."

Pratt *v.* Law, 9 Cranch, 456, 497.

"*Inchoate*: Recently or just begun; beginning; incipient; partially, but not fully in existence or operation; existing in its elements; incomplete."—*Webster.*

"Between property rights * * * and expectations of benefits from continuance of existing legislation there is as wide a difference as between realization and hopes."

Chinese Exclusion Case, 130 U. S., 609, 610.

EXAMPLES: Inchoate right of curtesy.

Percy *v.* Cockrill, 53 Fed., 881.

Act providing for payment of judgment against bank in its own bills.

Blount *v.* Windley, 95 U. S., 173.

Repeal of act allowing a second trial in ejectment.

People *v.* District Court (Colo.), 63 Pac., 321.

Repeal of appraisement law.

Phelps Co. *v.* N. Am. Trust Co. (Kan.), 64 id., 63.

Repeal of law giving statutory penalty.

Dunham *v.* Anders (N. C.), 38 S. E., 832.

Repeal of statute forbidding foreign corporation to sue.

Clark *v.* Durr (Ind.), 60 N. E., 688.

Abolishing right of distress.

Van Rensselaer *v.* Snyder, 13 N. Y., 299.

Where statute allowing appeal expires.

Yeaton *v.* U. S., 5 Cranch, 281.

Occupation of lands under pre-emption laws before payment of purchase money.

Frisbie *v.* Whitney, 9 Wall., 187.

An attachment lien is certainly not property; and no one ever heard of the sale or assignment of such a lien.

The fact that an act is retrospective leads to no inferences that it is void.

Stephens *v.* Cherokee Nation, 174 U. S., 446.

Gross *v.* U. S. Mortgage Co., 108 id., 488.

That Congress had the power to pass the curative act in this case is settled by the decision in *Williams v. Paine*, 169 *U. S.*, 79. There the lands lay within the District of Columbia, and the act was passed by Congress. The court said: "The (curative) statute applies where the parties intended to convey, thought they had conveyed, and yet had not complied with the requisites necessary to make the conveyance in all things effectual. In such case, especially where the consideration for the instrument has been received and retained, curative statutes may be passed which give validity to the defective instruments to the same extent as was intended by the parties at the time they were executed."

The many cases relating to curative acts, except in States having constitutional provisions forbidding the passage of retroactive laws, are thus summed up by the Court of Appeals of New York:

"This (the passing of a curative act) would be no greater exercise of power than the abolition of the right of distress for rent, or the lien of the landlord on property taken in execution or of the right of imprisoning the debtor. Yet the validity of such laws has been fully recognized even where they affected existing claims or judgments. They do not take away property, or affect the obligation of contracts."

Rapallo, J., in Watson *v.* Ry., 47 N. Y., 157.

The cases seemingly in point cited by counsel for plaintiff in error are cases from States whose Constitutions forbid retroactive laws, cases of judgments rendered on contracts, and cases from States where in case of sales and mortgages want of change of possession is made, by statute or otherwise, conclusive evidence of fraud; to which may be added two or three unconsidered *dicta*.

Counsel for plaintiff in error have displayed commendable zeal in their search for authorities; but those that they have discovered do not sustain the positions that counsel assume. To prove this assertion we are forced to examine the cases cited one by one. Finding them difficult of classification, we refer to them alphabetically; referring also to the pages of the brief in which they are cited.

Allison v. Ry., 9 *Bush*, 248 (brief, p. 35). A case of legislative usurpation of judicial functions in declaring certain county bonds valid.

Barrett v. Barrett (*N. C.*), 26 *S. E.*, 691 (brief, p. 31). The court expressly held the curative act valid; and said that no question arose as to rights of third persons.

Baumbach v. Singer (*Wis.*), 56 *N. W.*, 872 (brief, p. 35). Holds that curative act making invalid bond valid does not apply to judgments previously rendered. No judgment had been rendered against the defendant in error in this case when the curative act was passed. We have already shown that the judgment against Blocker is wholly irrelevant to the present controversy, in which the intervener claims against both the plaintiff and the defendant. Former brief, p. 5.

Bergman v. Sells, 39 *Ark.*, 97 (brief, p. 14). One who buys chattels before service of garnishment gets a good title.

Bigelow v. Topliff, 25 *Vt.*, 273, 60 *Am. Dec.*, 264 (brief, p. 31). This case was expressly overruled in Hackett *v.* Callender, 32 Vt., 108. See our former brief, p. 78.

Bishop v. Schneider, 46 *Mo.*, 472, 2 *Am. R.*, 533 (brief, p. 29). Holds that the registry of an unacknowledged deed imparts no notice; that a statute containing the word "heretofore" is retrospective; that the insufficiency of the acknowledgment could only avail a purchaser for a valuable consideration, which must be alleged in the answer, showing that the purchase money had been paid before notice.

Brinton v. Seevers, 12 *Iowa*, 392 (brief, p. 17). Placed expressly on the ground that the sale had been completed, the deed made and the purchase money paid; and that the curative act impaired the obligation of the contract thus completed.

Burch v. Newberry, 10 *N. Y.,* 374 (brief, p. 35). Act extending time for appeal which had previously expired held void.

Sampeyrac *v.* U. S., 7 Pet., 222 *contra.*

Also 3 Rose's Notes, p. 366.

Burt v. Williams, 24 *Ark.,* 91, 1862 (brief, p. 34). Decides that a statute continuing all suits until close of the war is unconstitutional.

Blaver v. Frick Co., 53 *Ark.,* 8 (brief p. 38). A mortgage registered in the wrong district imparts no notice.

Bostwick v. Blake (*Ill.*), 34 *N. E.,* 38 (brief, p. 23). Only decides that where no answer was filed to intervention but the parties proceeded as if there had been an answer, under the Illinois statute the question of fraud must be considered as having been put in issue.

Burnell v. Robertson, 5 *Gilman,* 289 (brief, p. 30). Placed solely on the ground that by statute the sale of chattels without delivery was void. P. 288.

Byers v. Engles, 16 *Ark.,* 543 (brief, p. 25). Counsel say that mortgages of chattels were governed by an entirely different statute. We have seen that the entire Revised Statutes were but one act. Sections 2, 3, 6, 7, of ch. 101 of the Revised Statutes expressly apply to conveyance of "any interest in goods and chattels." See synopsis appended hereto, pp. 7, 8.

Chestnut v. Shane, 16 *Ohio,* 599 (brief, p. 17). Curative act was sustained. Court said, only in a general way that such acts cannot divest vested rights, without giving any instance.

Cole v. Cunningham, 133 *U. S.,* 116 (brief, p. 14). Court expressly say that attachment lien is only inchoate.

Conrad v. Smith (*N. D.*), 70 *N. W.,* 815 (brief, p. 33). Statute made sale void because no change of possession. The court held that the second act was not intended to be retrospective. P. 817. See S. C., 51 N. W., 720.

Commissioners v. Rosche, 50 *Ohio St.,* 103, 40 *Am. St.,* 653 (brief, p. 17). Statute purported to create contractual liability where none had previously existed. Besides, the Constitution forbade the passage of "retroactive laws." P. 656, 40 Am. St. R.

Cowley v. McLaughlin (*Mass.*), 4 *N. E.,* 821 (brief, p. 29). "By a stretch an attaching creditor is regarded as in the light of a *bona fide* purchaser." That never was the law in Arkansas. Former brief, pp. 26-29. The case is in our favor.

Cross v. Fombey, 46 *Ark.,* 49 (brief, p. 21). Attachment lien is sustained by judgment. Certainly as between the parties.

Daggy v. Ball (*Ind.*), 34 *N. E.,* 246 (brief, p. 36). Held under statute giving lien on land for digging ditches, that repeal of the statute did not destroy lien previously accruing. This was decided on the language of the repealing statute; and the court expressly refrained from passing on the question as to vested rights. P. 247, second column.

Day v. Madden (*Colo.*), 48 *Pac.,* 15 (brief, p. 15). The decision is placed expressly on the ground that the Colorado Constitution forbids the passage of retrospective laws.

Deininger v. McDonnell, 41 *Ill.,* 227 (brief, p. 31). The act did not purport to be retroactive. So held. Nothing about liens.

Ely v. Holton, 15 *N. Y.,* 595 (brief, p. 36). In amendatory act the word "hereafter" relates to the date of that act, and not to the date of the act amended.

Fabri v. Murphy, 95 *U. S.,* 191 (brief, p. 36). No possible relevancy.

Files v. Fuller, 44 *Ark.,* 281 (brief, p. 36). No legislature can limit future legistatures. P. 280. Repeal of statute does not destroy claim for attorneys' fees, on two grounds: (1) That was not the legislative intent (p. 282); (2) the fees were due under a contract. Pp. 281-283.

Freiberg v. Singer (*Wis.*), 63 *N. W.,* 754 (brief, p. 17). Held that until judgment the legislature could by curative act take away rights obtained through garnishment. That did not mean a judgment against some or any third person as that against Blocker in this case.

Frellson v. Green, 19 *Ark.,* 376 (brief, p. 14). No rights of any third person intervened.

Goore v. McDaniel, 1 *McCord,* 480 (brief, p. 17). Only decides that a senior attachment is not displaced by a junior execution.

Goshen v. Stonington, 4 *Conn.,* 209, 10 *Am. Dec.,* 121 (brief, p. 14). Act validating former marriages held good.

Granger v. Adams, 90 *Ind.,* 87 (brief, p. 38). Same as last case. Statute required change of possession.

Green v. Drinker, 4 *Watts & S.,* 440 (brief, p. 31). The act did not purport to be retrospective. So held.

Green v. Van Buskirk, 7 *Wall.,* 139 (brief, p. 30). Decided under Illinois statutes, making change of possession necessary, and giving attaching creditor rights of *bona fide* purchaser. P. 146.

Griggs v. Banks, 59 *Ala.,* 311 (brief, p. 15). The court said: "It (the attachment lien) was not, however, *property, or a right of property, etc.* P. 316.

Grove v. Todd, 41 *Md.,* 633, 20*Am. R.,* 76 (brief, p. 32). Held that curative act could not cure defective acknowledgment of wife, even where no third persons were concerned. This is against nearly all of the authorities, including a number of decisions of this court.

Hall v. Stevens, 65 *Mo.,* 670 (brief, p. 17). See what is said by court below as to this case. (Tr., p. 87.)

Hannahs v. Felts, 15 *Iowa,* 143 (brief, p. 17). See what is said about this case by court below. (Tr., p. 87.) A pure *dictum,* as the court said that the act did not include attachments.

Harrison v. Trader, 29 *Ark.,* 92 (brief, p. 15). The court expressly said that there was no claim by any third party in that case. P. 93.

Hill v. Baker, 32 *Iowa,* 311 (brief, p. 32). Only decides that deed in attachment sales relates back to time of levy.

Hunter-Hutton-Evans Com. Co. v. Quigg, see *Strayhorn-Evans Com. Co. v. Quigg.*

Jones v. Graham, 77 *N. Y.,* 628 (brief, p. 27). Only decides that a mortgage given for a pre-existing debt does not give the mortgagee the position of a holder in good faith.

Kelly v. Dill, 23 *Minn.,* 435 (brief, p. 17). Only decides that "the owner cannot, by making the land his homestead," defeat a prior attachment.

Kennerly v. Swarz (*Va.*), 3 *S. E.,* 348 (brief, p. 20). Decides that a homestead in land cannot be acquired after judgment lien attached.

Lackey v. Seibert, 23 *Mo.,* 85 (brief, p. 17). Only decides that judgment in attahcment proceedings relates back to the levy.

Lawson v. Jeffries, 47 *Miss.,* 686 (brief, p. 35). Decides that constitutional convention could not grant new trials in the courts.

Lowe v. Harris (*N. C.*), 17 *S. E.,* 539 (brief, p. 14). Has no possible application. It was a case of a contract, and the court based its decision on the clause in the Federal Constitution forbidding laws impairing the obligation of contracts. P. 540, col. 1.

Lyon v. Sanford, 5 *Conn.,* 547 (brief, p. 17). Only holds that an attaching creditor has a right to redeem from a decree to which he was not a party foreclosing a mortgage.

McKeithan v. Terry, 64 *N. C.,* 25 (brief, p. 19). New Constitution did not by adopting homestead feature divest lien created by prior execution. The court said that such was not the intent of the Constitution. P. 26.

Meighan v. Strong, 6 *Minn.,* 111 (brief, p. 31). No question as to liens of any kind.

Memphis Land and Timber Co. v. Ford, 7 *C. C. A.,* 29, 58 *Fed.,* 452 (brief, p. 29). Holds that actual notice of an unrecorded deed is equivalent to constructive notice.

Menges v. Dentler, 33 *Penn. St.,* 495 (brief, p. 35). Court had decided a certain sheriff's deed to be void. Later legislative act declaring it valid held to be unconstitutional.

In *Merchants Bank v. Ballou* (*Va.*), 32 *S. E.,* 481 (brief, p. 9), the decision was expressly based on the fact that the judgment was founded on a contract. But even that position is untenable as shown by numerous authorities cited in our former brief. As was said by the court below: "A writ of attachment is nothing more than a remedy afforded by law for the collection of a debt." (Tr., p. 87.)

Mulnix v. Spratler (*Colo.*), 50 *Pac.,* 1078 (brief, p. 15). Same thing. P. 1080. Constitution forbids retroactive laws.

National Bank v. Riethman, 79 *Fed.,* 582 (brief, p. 16). An attachment, "being a remedy provided by statute, and resting on the statute alone, an unconditional repeal of the statute before judgment, and while the lien still remains contingent, destroys the lien." P. 583.

People v. Cameron, 7 *Ill.,* 468 (brief, p. 17). Only holds that the giving a forthcoming bond does not dissolve the attachment lien.

Rainwater-Boogher Hat Co. v. Malcolm, 52 *Fed.,* 734 (brief, p. 22). Only decides that possession is equivalent to actual notice.

Ratcliffe v. Anderson, 31 *Gratt.,* 105, 31 *Am. R.,* 716 (brief, p. 35). Act authorizing the setting aside of all judgments rendered between January 1, 1862, and April 10, 1865, held void.

Richardson v. Adler, 46 *Ark.,* 49 (brief, p. 16). Decides that if defendant marries or becomes the head of a family after attachment levied on land he cannot claim it as a homestead.

Rodd v. Heartt, 21 *Wall.,* 558 (The Lottawana) (brief, p. 34). A lien is a right of property. "That is a rule in admiralty that distinguishes admiralty liens from all others." Ben., Adm. (3d ed.), secs. 271, 290, 305.

In *Ryan v. Maxey* (*Mont.*), 35 *Pac.,* 515 (brief, p. 16), the act referred to did not purport to be retrospective.

Secard v. Davis, 6 *Pet.,* 124 (brief, p. 29). The court held that actual notice is equivalent to constructive notice. P. 139.

Sidway v. Lawson, 58 *Ark.,* 117 (brief, p. 35). Expressly held that the legislature may cure defective conveyances, and that such acts apply to pending suits.

Steamship Co. v. Joliffe, 2 *Wall.,* 457 (brief, p. 13). The plaintiff in error has no claim against defendant in error arising "upon a contract or a transaction in the nature of a contract."

Smith v. Moore, 11 *N. H.,* 55 (brief, p. 38). Statute required change of possession. P. 65.

Stansel v. Roberts, 13 *Ohio,* 148, 42 *Am. Dec.,* 193 (brief, p. 28). It is true that in Ohio the court adopted the rule that actual notice is not a substitute for constructive notice; also that the court afterwards regretted having done so. See former brief, p. 23.

Stewart v. Platt, 101 *U. S.,* 731 (brief, p. 28). A New York case. The statute required delivery of possession in case of an unrecorded mortgage. There never was any such law in Arkansas.

Strayhorn-Hutton-Evans Com. Co. v. Quigg, 97 *Fed.*, 735 (brief, p. 28). To read the opinion in this case one might suppose that by law in Arkansas change of possession was necessary to validate a mortgage; but the court do not say so. That never was the law in Arkansas. "The provision in a deed of trust that the property shall remain in the possession of the grantor until default of payment is no evidence of fraud if, under all the circumstances, the time for payment and sale be not unreasonable."

Hempstead *v.* Johnson, 18 Ark., 123, 1856.

See former brief, p. 40. Also

Valley Distilling Co. *v.* Atkins, 50 id., 291.

Puckett *v.* Reed, 31 Ark., 131, 1876.

Shaul *v.* Harrington, 54 id., 307.

White *v.* McCracken, 69 id., 617.

In view of this notorious principle of local law, entirely conformable to the rulings of this court, it is obvious that the court in the Quigg case meant that there was no such possession as to amount to notice to third persons, and not that the mortgage was void. A like case is Bank of Black Rock *v.* Decker, 65 Ark., 33. In both cases there was no notice except that claimed to arise from possession; and that was not sufficient.

In the Quigg case there was nothing to prevent the mortgagee, who was, it would seem, a resident of the Indian Territory, from having his mortgage recorded.

Summer v. Mitchell (*Fla.*), 10 *So.*, 562 (brief, p. 9). Counsel have entirely misunderstood this case. The curative act made acknowledgment in other States valid to convey

lands in Florida if taken according to the laws of such other States; and the act was held to be valid. Moreover the court cited with approval the very cases on which we rely:

Green *v.* Abrahams, 43 Ark., 420.

Johnson *v.* Richardson, 44 id., 365 (p. 567, col. 1).

Fowler *v.* Merrill, 11 How., 375 (p. 571, col 2).

Tillotson v. Millard, 7 *Minn.,* 513 (brief, p. 17). The act did not purport to be retroactive, and the claim of the defendant was without equity.

Travis v. Bishop, 13 *Metc.,* 304 (brief, p. 26). Has no application, since the statute of Massachusetts provides that "no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, *unless possession of the mortgaged property be delivered to, and retained by the mortgagee,* or unless the said mortgage be recorded in the office of the clerk," etc.

Bullock *v.* Williams, 16 Pick., 33.

Tyrell v. Rountree, 7 *Pet.,* 464 (brief, p. 18). The act in that case did not purport to divest the lien, and it was not a curative act.

U. S. v. Williams (*Mont.*), 19 *Pac.,* 287 (brief, p. 36). Suit by the United States for value of timber cut on public lands. After timber had been cut, and right of action had accrued, a repealing act was passed. Held that the right of action still subsisted.

Warren v. Jones, 9 *Rich.,* 288 (brief, p. 20). The act did not purport to be retroactive, and the court so held.

Watson v. Lumber Co., 49 *Ark.,* 83 (brief, p. 24). Granting all that counsel say this decision did not change the rule as to the validity of curative statutes as laid down in many cases.

Green *v.* Abrahams, 43 id., 624.

Apel *v.* Kelsey, 47 id., 420.

Cupp *v.* Welch, 50 id., 297.

State *v.* Hicks, 48 id., 519.

Sidway *v.* Lawson, 58 id., 121.

Bryan *v.* Bryan, 62 id., 83.

Hill *v.* Yarborough, id., 324.

Bluff City Lumber Co. *v.* Bloom, 64 id., 495.

Steers *v.* Kinsey, 68 id., 361.

Johnson *v.* Richardson, 44 id., 365.

British Mortgage Co. *v.* Winchell, 62 id., 160.

Williamson v. Ry., 29 *N. J. Eq.*, 306 (brief, p. 17). The court expressly said: "The act of 1876 itself does not necessarily require a retrospective construction, and *therefore* will not be allowed that effect." P. 335. The registration act required registration or change of possession. P. 332.

Willis v. Crooker, 1 *Pick.*, 204 (brief, p. 15). Contest between first and attaching creditors. No constitutional question was involved or decided.

As to cases like *Gunn v. Barry*, 15 *Wall.*, 610 (brief, p. 20), based on judgments on contracts, they have no application.

"A judgment is a contract." (Brief, p. 37.) This assertion implies unusual intrepidity in view of the decisions of this court. Former brief, p. 75.

But if the judgment against Blocker was a contract we are not seeking to impair it, as it does not bind the intervener.

It must be clear that if Congress possessed the power over the territories asserted by counsel (brief, p. 43), it certainly has power to pass the curative act in question. The

need for acts of that kind must more frequently occur in such communities than in older ones where laws have been more fully developed and individual rights have been more accurately defined.

Counsel say: "In passing curative statutes the legislature only assumes to do for the debtor what he might have been compelled to do by a court of chancery." P. 33.

It is needless to say that the authorities cited do not limit legislative power to that exercised by courts of chancery.

Counsel say: "It is perfectly clear from the recording act * * * that general creditors enforcing a lien and subsequent purchasers in good faith are put on the same footing, and each has the equal right to take advantage of improperly recorded conveyances." P. 27.

And this just after citing Byers *v.* Engles, which held that a purchaser with actual notice is not an innocent purchaser at all.

No conduct could be more strictly moral and honorable than that of the defendant in error in this case. It advanced $132,000 to Blocker, being the whole amount of the purchase money. It is not surprising that the defect in the Arkansas statute escaped observation. The same thing happened in Fowler *v.* Merrill, 11 How., 375. In both cases the mortgagees registered their mortgages, though there was no law for their registration; but in both cases the registration had the effect to "prevent as well as repel fraud." In the Fowler case the mortgagee was ultimately protected by a statute that did not purport to be retrospective. In this case a mortgagee, equally innocent, is protected by a law in terms retro-

spective, and intended to effect the same just object accomplished in the Fowler case under the same statutes applicable here.

Notwithstanding the spotless and unblemished conduct of the defendants in error counsel for McFaddin make their brief ring with the cries of fraud; but this is not the first time that the cry of "stop thief" has been raised as a measure of protection. In the extremely languid and debilitated opinion delivered in Main *v.* Alexander it was said that the failure to see that a certificate of acknowledgment of a mortgage was defective was a fraud, meaning, we suppose, a constructive fraud, as most transparently there was no actual fraud, since the mortgagee, according to his best lights, did all he could to protect himself by publicity. The Supreme Court of Arkansas has never repeated that expression in any similar case, wisely refraining to add insult to injury.

Now how does the case stand with McFadden? From times remote — for Le Neve *v.* Le Neve, decided more than a hundred and fifty years ago, was based on prior decisions — it has been held that one who attempts to seize property by attachment or execution that he knows belongs to another than a defendant in the writ, is guilty of actual fraud. If, then, the defendant in error is constructively guilty of fraud, by what process of reasoning can the plaintiff in error be made constructively honest?

Respectfully,

U. M. ROSE,

W. E. HEMINGWAY,

G. B. ROSE,

For Defendants in Error.

NOTE.—As many decisions were referred to in our former brief, we endeavor to lighten the labors of the court by presenting the following synopsis, which also contains literal copies of the various sections of statutes referred to, so that the court may see them at a glance. The act of Congress extending the Arkansas statutes over the Indian Territory, is of date May 2, 1890. All Arkansas decisions reported up to volume 53, p. 247, were rendered before that time.

SYNOPSIS OF FORMER BRIEF FOR DEFENDANT IN ERROR.

I. Statement of facts. (Brief, p. 1.)

II. Federal statute extending Constitution and Laws of the United States over the Indian Territory. (Brief, p. 3.)

"Section 32. The Constitution of the United States, and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations, shall have the same force and effect in the Indian Territory as elsewhere in the United States."

26 Stat. U. S., 96; approved May 2, 1890. (Brief, p. 3.)

III. Federal statute extending Arkansas statute over the Indian Territory. (Brief, p. 3.)

"Section 31. That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that State of 1883, as published in 1884, in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act, or any act of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating to * * * Frauds, statute of * * * Mortgages, * * * chapter 110, to Recorders, chapter 126," and so on designating various other chapters, including Attachments.

26 Stat. U. S., 94; approved May 2, 1890.

The act of the Arkansas Legislature adopting the Revised Statutes of 1838 is as follows:

"The revised code by Wm. McK. Ball and Samuel C. Roane, Esqrs., printed under the superintendence of Albert Pike, be, and the same is hereby declared to be, the law of Arkansas; and the same shall be in force, and have effect, when the governor shall have issued his proclamation, prescribing the time for the same to take effect, as provided by the statute passed at the last session of the general assembly, entitled 'An act concerning the Revised Statutes.'"

Session Acts 1838, p. 27.

Under the governor's proclamation the Revised Statutes went into effect March 11, 1839.

Fowler *v.* Merrill, 11 How., 395.

"For the purpose of construction the Revised Statutes passed at the present session of the general assembly shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times."

Rev. Stat. Ark., p. 697. (Brief, p. 11.)

IV. The intervention of the mortgagees. Pleadings. (Brief, p. 4.)

(*a*) A separate issue is formed on the interplea. (Brief, p. 5.)

Deloach Milling Co. *v.* L. R. Milling Co., 65 Ark., 467.

(*b*) The issue now presented is between the interveners and the attaching plaintiffs alone; and the interveners are not affected by the judgment against the defendant in the attachment. (Brief, p. 5.)

Splawn *v.* Martin, 17 Id., 146.

Clinton *v.* Estes, 20 Id., 216.

Erb *v.* Cole, 31 Id., 554.

Southern Development Co. *v.* Sylva, 125 U. S., 247.

(*b*) Production of the mortgages and notes placed the burden of proof on the attaching creditors to show fraud or invalidity. (P. 8.)

Hempstead *v.* Johnson, 18 Ark., 123.

Hill *v.* Srygley, 51 Id., 57.

Cunningham *v.* Williams, 42 Id., 170.

Colorado Coal Co. *v.* U. S., 123 U. S., 307.

Stephens *v.* Oppenheimer, 45 Ark., 492.

Holt *v.* Moore, 37 Id., 146.

Fitzgerald *v.* Walker, 55 Id., 153.

Jones *v.* Simpson, 116 U. S., 615.

Walker *v.* Collins, 59 Fed., 70.

First National Bank *v.* Lowrey (Neb.), 54 N. W., 571.

VIII. Legislation and construction as to registration of deeds and mortgages in Arkansas. (Brief, p. 8.)

As to mortgages:

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Rev. Stat., c. 101, sec. 2. (Brief, p. 11.)

Mansfield's Dig., sec. 4743.

The Revised Statutes also contains this section:

"All mortgages, whether for real or personal estate, shall be acknowledged before some person authorized by law to take the acknowledgment of deeds, and shall be recorded, if for lands, in the county or counties in which the lands lie; and, if for personal property, in the county in which the mortgagor resides."

Ch. 101, sec. 1; Mansfield's Dig., sec. 4742.

As to conveyances of all kinds:

"Section 2. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, as against creditors and purchasers prior and subsequent, shall be void."

Rev. Stat., c. 65.

Mansfield's Dig., sec. 3374.

"Section 3. No such conveyance or charge shall be deemed void in favor of an innocent subsequent purchaser, if the deed or conveyance shall have been duly acknowledged or proven and recorded, or the purchaser have actual notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance or person to be benefited by such charge, was party or privy to the fraud intended."

Rev. Stat., c. 65.

Mansfield's Dig., sec. 3375.

The Revised Statutes contains this provision:

"Section 6. No conveyance required by the provisions of this act to be recorded shall be valid or binding, except between the parties and their legal representatives, until the same shall have been deposited in the recorder's office for record; not even then if shown to be made with intent to defraud prior creditors or purchasers; but shall be void against such prior creditors or purchasers."

Rev. Stat., c. 65, sec. 6, title "Frauds."

This statute still remains in force.

Mansfield's Dig., sec. 3378.

"Section 7. This act shall not extend to any estate or interest in any lands or tenements, goods or chattels, or any rents or profits of the same, which shall be upon valuable consideration and *bona fide* and lawfully conveyed; nor shall this act be construed to avoid any deed or sale to a subsequent *bona fide* purchaser from the grantee for valuable consideration and without any notice of fraud."

Rev. Stat., c. 65.

Mansfield's Dig., sec. 7379.

The legislature on the 19th of December, 1846, passed the following act, which still remains in force:

"No deed, bond or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond or instrument, duly executed and acknowledged, or approved, as is, or may be, required by law, shall be filed for record in the office of the clerk and *ex-officio* recorder of the county where such real estate may be situated."

Mansfield's Dig., sec. 671.

In Main *v.* Alexander, 9 Ark., 112 (1848), being a contest between an attachment creditor and a mortgagee holding under a mortgage improperly acknowledged though recorded, the court held that under the above statutes actual notice was not a valid equivalent for constructive notice, and upheld the claim of the attaching creditor. (P. 12.)

The next case that came up was Byers *v.* Engles, 16 Ark., 543 (1855), a contest between an execution purchaser

and a prior purchaser holding under an unregistered deed, but of which the execution purchaser had notice before the execution sale. The court held (1) that actual notice is as valid as constructive notice; (2) that the filing of the deed for record at any time before the execution sale was sufficient notice; (3) that possession of the land was actual notice; and (4) that it is a fraud for a creditor to endeavor to apply the property of another to the payment of a debt that he does not owe; and so the decision was against the execution creditor. (P. 15.)

This last principle, as to fraud is supported by authorities almost innumerable. We cite a few:

Kerr, Fraud and Mistake, p. 266, and cases cited.

Priest *v.* Rice, 1 Pick., 166, and cases referred to in note.

LeNeve *v.* LeNeve, 3 Atk., 646; 2 Lead. Cas. Eq., 35.

Merrill *v.* Dawson, Hempst., 563.

Fowler *v.* Merrill, 11 How., 375.

Black *v.* Zacherie, 3 Id., 512.

Bridgewater Iron Co. *v.* Lissberger, 116 U. S., 8.

Mills *v.* Smith, 8 Wall., 27.

Hitz *v.* National Bank, 111 U. S., 728.

McCormick *v.* Grogan, L. R., 4 H. L., 97.

Duke of Leeds *v.* Earl of Amherst, 20 Beav., 239.

(*e*) The rule as to attachments and executions is the same. (P. 19.)

Grubbs *v.* Ellyson, 23 Ark., 287.

Meadow *v.* Wise, 41 Id., 289.

Beard *v.* Wilson, 52 Id., 291.

(*f*) The rule in Byers *v.* Engles has often been affirmed. (P. 24.)

Shinn *v.* Taylor, 28 Ark., 523.

Jackson *v.* Allen, 30 Id., 114.

Pindall *v.* Trevor, 30 Id., 266.

Atkinson *v.* Ward, 47 Id., 540.

Jones *v.* Fletcher, 42 Id., 450.

Wilson *v.* Slaughter, 53 Id., 139.

Williams *v.* McIlroy, 34 Id., 92.

Apperson *v.* Burgett, 33 Id., 336.

Doswell *v.* Adler, 28 Id., 85.

(*g*) The court in both of these cases (Main *v.* Alexander and Byers *v.* Engles) overlooked plain provisions contained in the same act thus construed by it; and which was equally conclusive in both cases. (P. 15.)

(*i*) Though Byers *v.* Engles evidently overruled Main *v.* Alexander, yet the doctrine laid down in the latter case is still adhered to. (Cases cited.) (P. 20.)

(*j*) But the court has limited the application of the rule. (P. 21.)

Martin *v.* Schichtel, 60 Ark., 595.

Stephens *v.* Shannon, 43 Id., 464.

Taliaferro *v.* Barrett, 37 Id., 511.

Memphis Ry. *v.* State, Id., 632.

Applewhite *v.* Mill Co., 49 Id., 279.

Garner *v.* Wright, 52 Id., 385.

(*k*) The same court has often expressed a regret that the rule in Main *v.* Alexander was ever adopted. (P. 22.)

Mitchell *v.* Wade, 39 Ark., 386.

Ford *v.* Burks, 37 Id., 94.

Wright *v.* Graham, 42 Id., 148.

Martin *v.* Ogden, 41 Id., 192.

(*l*) Like regrets have been expressed in other States. (P. 23.)

White *v.* Denman, 1 Ohio St., 110.

Hugus *v.* Robinson, 24 Pa. St., 11.

Davis *v.* Turner, 4 Gratt., 471.

IX. This case falls within exceptions recognized by the same court, and applicable to this case. (Brief, p. 25.)

(*a*)

Haskell *v.* Sevier, 25 Ark., 152.

Hall *v.* Pillow, 31 Id., 32.

Simpson *v.* Shackelford, 49 Id., 63.

McIntosh *v.* Hill, 47 Id., 363.

McRea *v.* Merrifield, 48 Id., 160.

(*b*) Volunteers do not come within the rule. (P. 26.)

Moore *v.* Little Rock, 42 Ark., 66.

Hill *v.* Coolidge, 33 Id., 626.

Taylor *v.* Mississippi Mills, 47 Id., 252.

Ames Iron Works *v.* Kalamazoo Pulley Co., 63 Id., 87.

(*c*) One who purchases under his own execution is charged with all the rights and equities which might be asserted against the defendant in the execution. (P. 28.)

Williams *v.* McIlroy, 34 Ark., 92.

Tennant *v.* Watson, 58 Id., 252.

An attaching creditor before sale cannot stand in any better position than he would occupy if he had bought under an attachment sale.

(*d*) Prior to the above decisions it was held that the maxim *caveat emptor* applied; and that in any case any purchaser under execution got just the estate of the defendant in execution, subject to all equities. (P. 29.)

Byers *v.* Engles, 16 Ark., 543.

Pindall *v.* Trevor, 30 Id., 266.

Pickett *v.* Merchants Nat. Bank, 32 Id., 369.

Watkins *v.* Trapnall, 15 Ark., 73.

Jones *v.* Fletcher, 42 Id., 422.

(*e*) If an attaching creditor buys under his judgment, and it is afterwards reversed, he gets no title. (P. 28.)

Fishback *v.* Weaver, 34 Ark., 569.

Boyd *v.* Roane, 49 Id., 416.

Bank U. S. *v.* Bank of Washington, 6 Pet., 19.

X. As to the rule that when a statute is borrowed from another jurisdiction the legislature is presumed to have intended to adopt decisions previously made construing it. (Brief, p. 30.)

(*a*) The rule is not followed blindly. (P. 30.)

Holliday *v.* Cohen, 34 Ark., 716.

Hunter *v.* Truckee Lodge, 14 Nev., 37.

Morgan *v.* State (Neb.), 71 N. W., 794.

Pease *v.* Peck, 18 How., 599.

Burgers *v.* Seligman, 107 U. S., 33.

Roberts *v.* Bolles, 101 Id., 128, 129.

Penn *v.* Bowler, 107 Id., 541.

Ober *v.* Gallagher, 93 Id., 207.

Gelpcke *v.* Dubuque, 1 Wall., 176.

Whitney *v.* Fox, 166 U. S., 647.

Butz *v.* Muscatine, 8 Wall., 582.

XI. Where the statute does not provide for the registration of a particular species of written instrument, such instrument, being outside of the statute, is nowise affected by it. (Brief, p. 33.)

(*a*) The decision in Watson *v.* Thompson Lumber Co., 49 Ark., 85 (1886), is inconsistent with the whole line of decisions, and is not supported by the authorities cited; which are here reviewed. (P. 35.)

(*b*) The Watson case having called attention to the defect of the registration clause of the mortgage act, the legislature amended that act by adding these words:

"*Provided,* That if the mortgagor is a nonresident of this State the mortgage shall be recorded in the county in which the property is situated at the time the mortgage is executed."

Act of February 5, 1891, Sandels & Hill's Dig., sec. 5090.

On the 3d of February, 1897, Congress passed the following act:

"Section 4742 of Mansfield's Digest of the laws of Arkansas heretofore put in force in the Indian Territory, is hereby amended by adding to said section as follows: *Provided,* That if the mortgagor is a nonresident of the Indian

Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated."

29 Statutes U. S., 510, c. 136.

XII. In Arkansas in case of a sale of personal property its nondelivery to the buyer does not raise a conclusive presumption of fraud. (Brief, p. 39.)

(*a*) Such was the rule in England. (P. 39.)

Notes to Twyne's case, 1 Smith L. C., 33.

Benj., Sales, Bennett's Ed., secs. 485, 489.

Bump, Fraud. Conv., p. 61.

(*b*) Such is the rule in Arkansas. Nondelivery is only a circumstance to be considered on an issue of fraud. (P. 39.)

Field *v.* Simco, 7 Ark., 269.

Cocke *v.* Chapman, Id., 197.

Adler-Goldman Co. *v.* Phillips, 63 Id., 51.

Valley Distilling Co. *v.* Atkins, 50 Id., 291.

Hempstead *v.* Johnson, 41 Id., 192.

Martin *v.* Ogden, 41 Id., 192.

(*c*) The same rule obtains in the Federal courts. (P. 40.)

Huntley *v.* Kingman, 152 U. S., 527.

Warner *v.* Norton, 20 How., 459.

Smith *v.* Craft, 123 U. S., 436.

XIII. Where the conveyance is on condition, as in mortgages, it is in no case necessary that the property shall be delivered. (Brief, p. 40.)

Bump, Fraud. Conv., p. 61 *et seq.*
Edward *v.* Harben, 2 Term, 595.
1 Pow., Mortg., 33 *a.*
Fitzgerald *v.* Beebe, 7 Ark., 319.
Ringo *v.* Woodruff, 43 Id., 489.
Conard *v.* Ins. Co., 1 Pet., 449.
Meeker *v.* Wilson, 1 Gall., 419.
Phettiplace *v.* Sayles, 4 Mason, 312.
Fowler *v.* Merrill, 11 How., 394.
U. S. *v.* Hooe, 3 Cranch, 89.
Hamilton *v.* Russell, 1 Id., 316.
Hempstead *v.* Johnson, 18 Ark., 134.
Jones, Chat. Mortg., sec. 323.

XIV. The decision in Main v. Alexander ought not to be imposed on the inhabitants of the Indian Territory. (Brief, p. 43.)

Judicial conflict on this subject in New York. (P. 45.)

Doane *v.* Eddy, 16 Wend., 523.
Waring *v.* Smith, 2 Barb., Chy., 119.
Butler *v.* Van Wyck, 1 Hill, 456.
Craig *v.* Ward, 9 Johns., 197.
Excelsior Mfg. Co. *v.* Owens, 58 Ark., 556.

XV. The curative act of Congress made the mortgages as valid as against attaching creditors with notice as if they had been duly and legally registered at the time they were actually filed. (Brief, p. 54.)

(*a*) The act is retrospective. (P. 54.)

People *v.* Crennan, 141 N. Y., 239; 36 N. E., 187.

People *v.* Spicer, 99 N. Y., 233.

Sampeyrac *v.* U. S., 7 Pet., 222.

Fowler *v.* Merrill, 11 How., 375.

(*b*) Curative statutes are liberally construed. (P. 54.)

Wilkinson *v.* Leland, 2 Pet., 627.

Larkin *v.* Saffarans, 15 Fed., 150.

(*c*) The power of Congress over the Territories is plenary. (P. 55.)

Mormon Church *v.* U. S., 136 U. S., 42.

Laramie Co. *v.* Albany Co., 92 U. S., 310.

Benner *v.* Porter, 9 How., 242.

McAlister *v.* U. S., 141 U. S., 184.

Shirley *v.* Bowlby, 152 Id., 48.

Koenigsberger *v.* Richmond Silver Mining Co., 158 U. S., 48.

Am. Ins. Co. *v.* Ganter, 1 Pet., 542.

Rogers *v.* Burlington, 3 Wall., 663.

Good *v.* Martin, 95 U. S., 90.

Clinton *v.* Engelbrecht, 13 Wall., 434.

Reynolds *v.* U. S., 98 U. S., 115.

Hornbuckle *v.* Tombs, 18 Wall., 645.

2 Story, Const., secs. 1324, 1325.

(*d*) Specially with regard to the Indian tribes. (P. 56.)

U. S. *v.* Kagama, 118 U. S., 380.

(*e*) The acts of Congress extending the Constitution and Federal laws over the Indian Territory is subject to modification and repeal the same as other statutes. (P. 56.)

Cooley, Const. Lim., 146.

District of Columbia *v.* Hutton, 143 U. S., 18.

(*f*) The curative act applies to pending suits. (P. 56.)

U. S. *v.* Peggy, 1 Cranch., 103.

Sidway *v.* Lawson, 58 Ark., 122; overruling Wright *v.* Graham, 42 Id., 140.

Pelt *v.* Payne (Ark.), 30 S. W., 426.

Cooley, Const. Lim., pp. 469, 442.

Johnson *v.* Richardson, 44 Ark., 372.

Reid *v.* Hart, 45 Id., 50.

In re Hall, 167 U. S., 38.

Tennessee *v.* Sneed, 96 Id., 69.

Perriman's case, 103 Id., 720.

1 Kent, Comm., 455.

(*g*) There is nothing to prevent Congress from passing the curative act. (P. 56.)

Curtis *v.* Whitney, 13 Wall., 70.

Townsend *v.* Townsend, Peck R., 117.

Larkin *v.* Saffarans, 15 Fed., 147.

(*h*) The attaching creditor acquired no vested right which exempts it from the operation of the curative act. (P. 57.)

The attaching creditor acquires no property in the thing attached. (P. 58.).

Ladd *v.* North, 2 Mass., 514.

Bigelow *v.* Wilson, 1 Pick., 492.

Dobbins *v.* Hanchett, 20 Ill. App., 396.

Davidson *v.* Beatty, 3 Har. & McH., 594.

Owings *v.* Norwood, 2 Har. & J., 96.

Millar *v.* Babcock, 25 Mich., 137.

Goddard *v.* Perkins, 9 N. H., 488.

Snell *v.* Allen, 1 Swan, 208.

Starr *v.* Moore, 3 McLean, 354.

Tennant *v.* Watson, 58 Ark., 255.

Atkins *v.* Swope, 38 Id., 536.

Green *v.* Abraham, 43 Id., 420.

Pratt *v.* Law, 9 Cranch, 497.

Steers *v.* Kinsey, 68 Ark., 360; 58 S. W., 1050.

Butler *v.* Pennsylvania, 10 How., 416.

New Orleans *v.* N. O. Waterworks Co., 142 U. S., 88.

Campbell *v.* Holt, 115 U. S., 620.

Randall *v.* Krieger, 23 Wall., 149.

Little Rock *v.* Merchants Nat. Bank, 98 U. S., 314.

St. Louis Ry. *v.* Alexander, 49 Ark., 190.

Porter *v.* Doe, Id., 187.

Files *v.* Fuller, 44 Id., 281.

South Carolina *v.* Gaillard, 101 U. S., 433.

Memphis *v.* U. S., 97 U. S., 293.

Webster *v.* Cooper, 14 How., 488.

Antonie *v.* Greenhow, 107 U. S., 769.

Cooley, Const. Lim., 457.

Conkey *v.* Hart, 14 N. Y., 28.

Haynes *v.* Wady, 73 Mich., 178; 41 N. W., 222.

Bangor *v.* Goding, 35 Me., 73; 56 Am. Dec., 688.

McCardle *Ex Parte,* 7 Wall., 506.

Ry. *v.* Grant, 98 U. S., 398.

Norris *v.* Crocker, 13 How., 438.

Sherman *v.* Grinnell, 123 U. S., 679.

Gurney *v.* Patrick Co., 137 Id., 141.

Morey *v.* Lockhart, 123 Id., 56.

Nat. Bank. *v.* Peters, 144 Id., 570.

Hornthal *v.* Collector, 9 Wall., 560.

Assessor *v.* Osborne, Id., 567.

Campbell *v.* Silver Mining Co., 27 C. C. A., 646; 83 Fed., 643; 8th Circuit.

Mechanics Bank *v.* Union Bank, 22 Wall., 298.

Wilkinson *v.* Leland, 2 Pet., 627.

Curtis *v.* Whitney, 13 Wall., 70.

Vance *v.* Vance, 108 U. S., 514.

Satterlee *v.* Matthewson, 2 Pet., 407.

Watson *v.* Mercer, 2 Pet., 88.

Ins. Co. *v.* Ritchie, 5 Wall., 544.

Norris *v.* Crocker, 13 How., 439.

U. S. *v.* Tyne, 11 Wall., 88.

Baltimore Ry. *v.* Nesbitt, 10 How., 395.

Calder *v.* Bull, 3 Dall., 386.

Randall *v.* Krieger, 2 Dill., 444.

Maynard *v.* Hill, 125 U. S., 210.

Richardson *v.* Bellingham Co., 47 Fed., 854.

Ewell *v.* Daggs, 108 U. S., 150.

Woodruff *v.* Scruggs, 27 Ark., 26.

McCormick *v.* U. S., 2 Ohio, 74.

Bangor *v.* Golding, 35 Me., 73; 56 Am. Dec., 688.

Essex Board *v.* Skinkle, 10 Id., 334.

Sturgis *v.* Crowninshield, 4 Wheat., 201.

Van Hoffman *v.* Quinby, 4 Wall., 553.

Hynson *v.* Taylor, 3 Ark., 555.

Edwards *v.* Cooper, 28 Id., 469.

Watson *v.* Ry., 47 N. Y., 157.

(*i*) Courts of chancery cannot, in correcting mistakes in written documents, divest vested rights. (P. 68.)

Davidson *v.* Davidson, 42 Ark., 362.

Woodworth *v.* Cook, 2 Blatchf., 151; 30 Fed. Cas., p. 561.

Gibson *v.* Cook, 2 Blatchf., 144; 10 Fed Cas., p. 314.

Moloney *v.* Rourke, 100 Mass., 190.

Green *v.* Abraham, 43 Ark., 624.

But the Supreme Court of Arkansas has held that such correction might be made against a purchaser with notice.

Simpson *v.* Montgomery, 25 Ark., 365, 372.

Against a purchaser under execution having notice. (P. 68.)

Stewart *v.* Pettigrew, 28 Id., 372.

Blackburn *v.* Randolph, 33 Id., 126.

Allen *v.* McGaughey, 31 Id., 253.

Williams *v.* McIlroy, 34 Id., 85.

Fort Smith Milling Co. *v.* Mikles, 61 Id., 123.

Against a judgment creditor having a lien. (P. 69.)

Brewster *v.* Clamfit, 33 Ark., 76.

See also

Wadsworth *v.* Wandell, 5 Johns., Chy., 224.

Bernardo Tp. *v.* Stebbins, 109 U. S., 391.

Cooley, Const. Lim., p. 457.

(*j*) The moral aspect of the case is not only important; it is decisive. No one has a vested right to do wrong. (P. 61.)

Freeland *v.* Williams, 131 U. S., 405.

Foster *v.* Essex Bank, 16 Mass., 245.

Freeborn *v.* Smith, 2 Wall., 160.

Sampeyrac *v.* U. S., 2 Pet., 222.

Goshorn *v.* Purcell, 11 Ohio St., 78.

Trustees *v.* McCaughey, 2 Id., 155.

Beard *v.* Dansby, 48 Ark., 184.

Leighton *v.* Young, 52 Fed., 444; 18 L. R. A., 266.

Phillips, Mech. Liens, sec. 23.

Best *v.* Baumgardner (Penn.), 15 Atl., 691.

Providence Inst. *v.* Jersey City, 113 U. S., 145.

Bolton *v.* Jones, 5 Pa. St., 145; 47 Am. Dec., 404.

South Carolina *v.* Gaillard, 101 U. S., 433.

National Bank *v.* Reithman, 79 Fed., 582, 8th Circuit.

Tennessee *v.* Sneed, 96 U. S., 69.

Perriman's case, 103 Id., 720.

1 Kent, Comm., 455.

(*k*) As to curative acts "the question is one of reasonableness." (P. 74.)

Terry *v.* Anderson, 95 U. S., 80.

State *v.* Newark, 25 N. J. L., 197.

(*l*) As the plaintiff in error does not claim as against the intervener under any contract, it is clear that his lien does not give him any vested right. (P. 74.)

Louisiana *v.* Mayor of New Orleans, 109 U. S., 285.

Louisiana *v.* St. Martin's Parish, 111 Id., 716.

Freeland *v.* Williams, 136 Id., 405.

Chase *v.* Curtis, 113 Id., 463, 464.

Wisconsin *v.* Ins. Co., 127 Id., 292.

(*m*) It is only when a right of action is based on a contract that has been so far perfected that "nothing remains to be done by the party asserting it," that it can become vested. (P. 75.)

Steamboat Co. *v.* Joliffe, 2 Wall., 457.

Freeland *v.* Williams, 136 U. S., 405.

Chase *v.* Curtis, 113 Id., 463, 464.

(*n*) A judgment is not a contract. (P. 75.)

Morley *v.* Ry., 146 U. S., 162.

Louisiana *v.* Mayor, 109 Id., 288.

Garris *v.* New York, 21 Wall., 203.

XVI. The dissenting opinion of his honor, Judge Sanborn. (P. 76.)

(*a*) Seizure under attachment does not affect the title. (P. 76.)

Merrick *v.* Hall, 15 Ark., 344.

High, Inj., secs. 1, 5.

(*b*) The lien is only "a security against purchasers and incumbrancers." (P. 77.)

4 Kent, Comm., *436.

Hackett *v.* Callender, 32 Vt., 108; overruling Bigelow *v.* Topliff, 25 Id., 273.

Jones, Liens, sec. 12.

Perrin *v.* Reed, 35 Vt., 8.

Drake, Attachm., secs. 223, 245.

Hart *v.* Farmers Bank, 33 Id., 253.

(*c*) The interest of a mortgagor in chattels cannot be levied on. (P. 77.)

Jennings *v.* McIlroy, 42 Ark., 236.

Buck *v.* Bransford, 58 Id., 291.

Cox *v.* Harris, 64 Id., 214.

(*d*) No fraud, actual or constructive, is alleged or shown. Defendant in error is both a *bona fide* purchaser for value and a creditor. (P. 80.)

Roberts, Fraud. Conv., p. 30.

(*e*)

Farguson *v.* Edrington, 49 Ark., 214.

Gerson *v.* Pool, 31 Id., 85.

Kesner *v.* Trigg, 98 U. S., 50.

(*f*) The assertion that the judgment by default against Blocker precludes the intervener is wholly unsupported by the authorities. (P. 81.)

Waples-Platter Co. *v.* Low, 54 Fed., 95; opinion by Sanborn, J.

Huiscamp *v.* Moline Wagon Co., 121 U. S., 319.

(*g*) Since all of the money invested in the purchase of the cattle was advanced by defendants in error it is impossible to say that plaintiff in error has been injured in any manner. (P. 86.)

XVII. All of the questions arising in this controversy were decided in our favor upon precisely the same statutes in the case of Fowler v. Merrill, 11 How., 375 (1850), more than fifty years ago; and that decision has never been overruled, or even criticised. (Brief, p. 87.)

We note the following *errata* in former brief:

Page 10. *Walker v. Collins,* should read 59 Fed.

Page 75. *Morley v. Ry.,* should read 146 U. S., p. 162.